(1)

No. 99-5716-CFY Title: Floyd J. Carter, Petitioner
v.
United States

Docketed: August 12, 1999 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Aug 12 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 22, 1999)
	Sep 10 1999	Waiver of right of respondent United States to respond filed.
	Sep 16 1999	DISTRIBUTED. October 8, 1999
	Sep 20 1999	Response requested. (Due October 21, 1999 - NONE RECEIVED)
	Oct 14 1999	Order extending time to file response to petition until November 22, 1999.
	Nov 17 1999	Brief of respondent United States filed.
	Nov 24 1999	REDISTRIBUTED. December 10, 1999
	Dec 13 1999	Petition GRANTED. SET FOR ARGUMENT April 19, 2000. **********
	Jan 5 2000	Order extending time to file petitioner's brief on the merits to and including February 8, 2000. Respondent's brief is due on or before March 9, 2000, and a reply brief is on or before April 10, 2000.
	Jan 28 2000	Joint appendix filed.
	Feb 8 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Feb 8 2000	Brief of petitioner Floyd J. Carter filed.
	Mar 9 2000	Brief of respondent United States filed.
	Mar 10 2000	CIRCULATED.
	Apr 5 2000	Record filed.
	Apr 7 2000	Reply brief of petitioner Floyd J. Carter filed.
	Apr 17 2000	Record filed.
	Apr 19 2000	ARGUED.

1pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY

AT THE TIME OF FILMING. IF AND WHEN A

BETTER COPY CAN BE OBTAINED, A NEW FICHE

WILL BE ISSUED.

(2)

99-5716

NO:_____

Supreme Court, U.S.
FILED
AUG 12 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

FLOYD J. CARTER
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Floyd J. Carter, pursuant to The Supreme Court of the United States Rule 39 and 18 U.S.C. § 3006A(d)(6), asks for leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the District of New Jersey and on appeal to the United States Court of Appeals for the Third Circuit, and consistent with The

RECEIVED
AUG 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

60 pp

(9)

Supreme Court of the United States Rule 39, no Affidavit is required to be filed in support of this motion.

Dated: August 11, 1999

Respectfully submitted,

Donald J. McCauley, Esq.
Assistant Federal Public Defender
972 Broad Street
Newark, New Jersey 07102
973-645-6347

Attorney for Petitioner
Floyd J. Carter

99-5716

No. 99-_____

Supreme Court, U.S.
FILED
AUG 12 1999
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Floyd J. Carter,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRITT OF CERTIORARI

Jeffrey T. Green
Joseph S. Miller
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

Richard Coughlin
Donald J. McCauley*
FEDERAL PUBLIC DEFENDER
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner

***Counsel of Record**

99-5716
Carter
v.
United States

QUESTION PRESENTED

Whether federal bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of federal bank robbery, 18 U.S.C. § 2113(a), as a matter of law.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

- Factual Background 3
- District Court Rulings 4
- The Decision of the Court of Appeals 6

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 16

APPENDIX 1a

- Third Circuit's Judgment and Memorandum Opinion filed June 16, 1999 ..... 1a
- District Court's Oral Opinion 11a
- Judgment in a Criminal Case filed in the District Court on October 28, 1999 ..... 23a
- Amended Judgment in a Criminal Case filed in the District Court on December 8, 1998 ..... 29a
- Statutory Provisions Involved 35a

TABLE OF AUTHORITIES

Cases **Page(s)**

Almendarez-Torres v. United States, 118 S. Ct. 1219 (1998)..... 13

Bell v. United States, 462 U.S. 356 (1983)..... 7

Jones v. United States, 119 S. Ct. 1215 (1999)..... 13, 15

Morissette v. United States, 342 U.S. 246 (1952)..... 10, 13

Mosley v. United States, 118 S. Ct. 1298 (1998)..... 2, 8

Mosley v. United States, 119 S. Ct. 484 (1998)..... 2, 7, 8

Prince v. United States, 352 U.S. 322 (1957)..... 14

Schmuck v. United States, 489 U.S. 705 (1989)..... 10

Staples v. United States, 511 U.S. 600 (1994)..... 11

United States v. Amos, 566 F.2d 899 (4th Cir. 1977)..... 9

United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994)..... 9

United States v. Brown, 547 F.2d 36 (3d Cir. 1976)..... 7

United States v. Bryan, 118 S. Ct. 1939 (1998)..... 5

United States v. Cady, 495 F.2d 742 (8th Cir. 1974)..... 9

United States v. Cornillie, 92 F.3d 1108 (11th Cir. 1996)..... 9

United States v. Flint, 534 F.2d 58 (5th Cir. 1976)..... 9

United States v. Gregory, 891 F.2d 732 (9th Cir. 1989)..... 9

United States v. Henson, 945 F.2d 430 (1st Cir. 1991)..... 9

United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998)..... *passim*

United States v. Richardson, 687 F.2d 952 (7th Cir. 1982)..... 12

United States v. Turley, 352 U.S. 407 (1957)..... 12, 13

United States v. United States Gypsum Co., 438 U.S. 422 (1978)..... 11

United States v. Walker, 75 F.3d 178 (4th Cir. 1996)..... 9

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)..... 11

Statutes & Rules – Current

18 U.S.C. § 2113..... *passim*

28 U.S.C. § 1254..... 1

Federal Rule of Criminal Procedure 20..... 6

Third Circuit Local Appellate Rule 30.3(c)..... 6

Statutes – Historical

12 U.S.C. § 588b (1940)..... 2, 12

18 U.S.C. § 1 (Supp. V 1947-52)..... 2, 12

18 U.S.C. § 2113 (Supp. V 1947-52)..... 2

Act of May 18, 1934, ch. 304, 48 Stat. 783..... 12

Act of Aug. 24, 1937, ch. 747, 50 Stat. 749..... 12, 13

Act of June 25, 1948, ch. 645, 62 Stat. 683..... 12

Other Authorities

4 William Blackstone, *Commentaries*..... 12

Black's Law Dictionary (6th ed. 1990)..... 12

Webster's New Collegiate Dictionary (2d ed. 1974)..... 10

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

Floyd J. Carter,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Floyd J. Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is unreported. Its judgment and opinion are attached at Petitioner's Appendix ("Pet. App.") 1a-10a. The district court's opinion, also unreported, was stated on the record at trial and is attached at Pet. App. 11a-22a.

JURISDICTION

The court of appeals entered judgment in this case on June 16, 1999. (Pet. App. 2a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "Bank robbery and incidental crimes" provisions of Chapter 103 ("Robbery and Burglary") of

Title 18 are the central statutory provisions involved. The entirety of 18 U.S.C. § 2113 is set forth in the Appendix (Pet. App. 35a-36a), along with the predecessor to the present statute, 12 U.S.C. § 588b ("Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods") (*id.* at 36a-37a). In 1948, 12 U.S.C. § 588b was recodified at 18 U.S.C. § 2113. The amendments that accompanied the 1948 recodification appear to have been made to conform the provision with § 1 of Title 18 ("Offenses Classified") (*id.* at 37a).

STATEMENT OF THE CASE

Last Term, this Court granted certiorari to determine the exact same issue presented by this case: namely, whether federal bank larceny constitutes a lesser included offense of federal bank robbery. *See Mosley v. United States*, 118 S. Ct. 1298, 1299 (1998) (granting certiorari). The Court was deprived of the opportunity to settle this issue, however, because Mr. Mosley died after the parties briefed and argued the case, but before this Court could render a decision on the merits. After Mr. Mosley's death, the writ was dismissed. *See Mosley v. United States*, 119 S. Ct. 484 (1998) (dismissing certiorari).

This case, which presents precisely the same question as *Mosley*, offers the Court an opportunity to resolve the continuing split in the courts of appeal that prompted review in *Mosley*. Consistent with the text, structure, and history of the bank robbery and bank larceny statutes, several courts of appeal permit juries to be instructed on the lesser included offense of bank larceny. The Third and Ninth Circuits, which are in the minority, hold that, as a matter of law, the larceny instruction cannot be given in a bank robbery case, even where the evidence supports it and the defense requests it. Like *Mosley*, this case also raises fundamental questions about the role played by established common law meanings of a phrase or term when a court interprets a federal criminal

statute incorporating that phrase or term. This Court should therefore grant certiorari in this case to finish the task it began last Term.

Factual Background. On September 9, 1997, petitioner Floyd J. Carter, unarmed (C.A. App. 165)[1] and wearing a ski mask to conceal his identity, ran into the Collective Savings Bank in Hamilton, New Jersey, for the purpose of stealing money from the bank (*id.* at 155). Although he had waited outside the bank until he thought all the customers had left (*id.* at 156 ("I thought nobody was in there.")), on his way into the bank, petitioner bumped into a customer as she was walking out the door (*id.* at 156). With only one goal in mind – to "take the money and run" – petitioner quickly stepped around the customer. (*Id.* at 157.) He proceeded to an unoccupied teller station, specifically so that he would not "scare nobody or nothing." (*Id.* at 159-60.)

Petitioner jumped over the unoccupied teller station, pulled open the drawer, and emptied it of its money. (C.A. App. 160.) He ran to two other drawers behind the counter, emptying them into a bag as well. (*Id.*) As petitioner was filling his bag, he told the tellers not to worry and assured them that he would not hurt anybody. (*Id.* at 160-61.) After he finished collecting money from the open teller drawers, he went back to the unattended teller station to avoid direct contact with the tellers and jumped back over the counter. (*Id.* at 162.) He seized approximately $16,000 in cash from the unoccupied teller stations. (*Id.* at 164-65; Pet. App. 5a.) As he ran out the door, petitioner told the bank employees, "Don't bother following me, I run fast." (C.A. App. 164.)

[1]"C.A. App.," followed by a page number, refers to the appendix filed with petitioner's brief in the Third Circuit.

Later that same day, the police apprehended petitioner.[2] During questioning, petitioner admitted that he stole the money from the bank. (C.A. App. 116-17.) Petitioner never denied his involvement, his conduct, or the facts surrounding the theft of the Collective Savings Bank. He was charged on September 12, 1997, in the District of New Jersey with bank robbery in violation of 18 U.S.C. § 2113(a). (*Id.* at 8.) After admitting to all the basic facts (*id.* at 116-17), petitioner pleaded not guilty to the charge of bank robbery (*id.* at 3 (Docket Entry No. 5)).

District Court Rulings. At a status conference on January 20, 1998, the district court addressed petitioner's pretrial motion requesting that the court instruct the jury on the lesser included offense of bank larceny. (C.A. App. 11-18.) The court initially concluded that an instruction that bank larceny constitutes a lesser included offense of bank robbery would be improper, but deferred the ultimate determination of the issue until later.[3] (*Id.*)

The trial lasted for two days in January 1998. Petitioner moved for acquittal after the close of the Government's case, arguing that the Government had failed to produce sufficient evidence upon which a jury could reasonably find petitioner guilty of bank robbery. (C.A. App. 127-29.) The district court denied the motion for acquittal and suggested that the requested larceny instruction

[2]Terry A. Stilwell, petitioner's get-away driver, also was apprehended that same day. He entered a plea agreement and was sentenced to two years and 4 months in prison. (C.A. App. 5-6.)

[3]The district court expressly relied upon the Third Circuit's decision in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998), stating that "[i]t's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute[s], *we decline to follow the majority of the circuits* in finding the latter to [be] the lesser included offense and we so hold." (C.A. App. 14 (emphasis added).)

would not be given.[4] (Pet. App. 18a-22a.) At the close of all the evidence, petitioner renewed his motion for acquittal, and the motion was denied. (C.A. App. 191-92.) When the district court charged the jury, the requested larceny instruction was not given. (*Id.* at 239-60.) The court instructed the jury on the charge of bank robbery alone and explained that, for the jury to find the defendant guilty, it needed to be satisfied that the Government proved "that the defendant acted knowingly and willfully." (*Id.* at 251-52.) The court included a "specific intent element" in the bank robbery instruction, defining "willfully" for the jury as an instance when a "person acts voluntarily and with the specific intent or purpose to do something the law forbids."[5] (*Id.* at 252). The court also explained that "[t]he essence of the offense is the taking of money or property aided and accompanied by intentional, intimidating behavior on the part of the particular defendant. The focus is on the conduct of the accused. The conduct must be reasonably calculated to produce fear of bodily harm." (*Id.* at 290). On January 23, 1998, the jury returned a verdict of guilty on the bank robbery charge.

Prior to sentencing, petitioner had been indicted in the Eastern District of Pennsylvania on three counts of bank larceny on the basis of conduct remarkably similar to that for which he was convicted of bank robbery in New Jersey. (C.A. App. 263-65.) Petitioner pleaded guilty to the bank

---

[4]In denying the motion, the district court again relied on the *Mosley* decision, explaining that "as a matter of law *in this Circuit* . . . the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense." (Pet. App. 20a (emphasis added).)

[5]This Court recently defined "willfully" as "with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *United States v. Bryan*, 118 S. Ct. 1939, 1946 (1998). After using specific intent to describe "willfully," the district court did not further instruct the jury as to the meaning of "specific intent." (C.A. App. 252, 288-89.)

larceny charges, which subsequently were transferred to the District of New Jersey pursuant to Federal Rule of Criminal Procedure 20. (Presentence Investigation Report ¶ 3.)[6] Each of the larceny charges involved the same basic methods petitioner used to take money from the Collective Savings Bank. Specifically, according to all the larceny counts, petitioner had run into a bank wearing a ski mask, jumped over a teller counter, and taken money from a teller drawer. (*Id.* at ¶ 31.) The larceny charges were consolidated with the bank robbery charge for sentencing in the District of New Jersey.

The court sentenced petitioner to prison terms of 17 years and 11 months for bank robbery and 10 years on each bank larceny charge and directed that the larceny and robbery sentences run concurrently. (Pet. App. 24a.) On November 6, 1998, petitioner moved to amend the judgment. (C.A. App. 332.) The court amended the judgment in December 1998, resentencing petitioner to prison terms of 17 years and 11 months for bank robbery and two years for each bank larceny conviction and ordering that the sentences run concurrently. (Pet. App. 29a.)

The Decision of the Court of Appeals. Petitioner appealed his conviction, contending, among other things, that the district court erred by refusing to instruct the jury on the lesser included offense of bank larceny.[7] (Pet. App. 6a). The court of appeals affirmed. (*Id.* at 10a.)

---

[6]Pursuant to Local Appellate Rule 30.3(c), the Presentence Investigation Report was filed with the Third Circuit on appeal.

[7]Petitioner not only argued that, as a matter of law, the jury instruction omitting larceny as a lesser included offense of bank robbery was erroneous, but also explained that the facts of his case clearly warranted the instruction. (Pet. Opening Third Circuit Brief at 13-17.) Similarly, petitioner contended that the district court should have granted a judgment of acquittal because a reasonable jury could not have found petitioner guilty of bank robbery based on the evidence presented and, therefore, the Government could not carry its burden of proof at trial. (*Id.* at 42-43.) Petitioner relied on the testimony of the Government's witnesses – including Maria Zahn, the customer (C.A. App. 38, 42); Marjorie Cudney, the customer service representative (*id.* at 72-73); and Robert Phipps, the branch manager (*id.* at 111) – who

The court of appeals concluded that "the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b)." (Pet. App. 7a (*citing United States v. Mosley*, 126 F.3d 200, 204 (3d Cir. 1997), *cert. dismissed*, 119 S. Ct. 484 (1998)).) The court of appeals also cited its decision in *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976), in which it had earlier held that "specific intent is not an essential element of a violation of" the bank robbery statute. (Pet. App. 8a.) Next, the court reiterated its conclusion that Congress, in the current robbery statute, did not employ common law language to define bank robbery and bank larceny. (Pet. App. 8a *(citing Bell v. United States*, 462 U.S. 356, 360 (1983)).) Finally, according to the Third Circuit, "[s]ection 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property." (*Id.*) These were essentially the same reasons the Third Circuit articulated to support its decision in *Mosley*.[8]

REASONS FOR GRANTING THE PETITION

There are three compelling reasons why this Court should grant certiorari in this case. First, the case presents an issue which this Court correctly deemed worthy of review just last Term, but which the Court lost the opportunity to decide through happenstance. Second, the Third Circuit's

---

consistently testified that petitioner made no demands of them or threats against them.

[8]As in the instant case, the defendant in *Mosley* had been indicted for bank robbery in violation of 18 U.S.C. § 2113(a). He went to trial to challenge the application of the bank robbery statute to his conduct. He argued that, because he did not use force and violence or intimidation, he was guilty not of bank robbery but of bank larceny. The district court refused to instruct the jury on bank larceny, and the jury found *Mosley* guilty of bank robbery. On appeal, the Third Circuit concluded that, as a matter of law, bank larceny is not a lesser included offense of bank robbery and thus established the precedent on which the decision in this case squarely rests. See *Mosley*, 126 F.3d at 206.

holding in this case conflicts directly with the holdings of several other circuits. *See United States v. Mosley*, 126 F.3d 200, 206 (3d Cir. 1997) (collecting cases acknowledged to conflict), *cert. dismissed*, 119 S. Ct. 484 (1998). This case thus presents the same clear split among the circuit courts of appeal that prompted review of the same question last Term. Finally, this split among the circuits should be resolved in order to prevent the unfair administration of justice. Specifically, the conflict among the circuits results in the intolerable disparate treatment of those defendants who happen to be charged in a jurisdiction within the Third Circuit, rather than in virtually any other jurisdiction within the United States.

1. Only last Term, this Court granted certiorari in *Mosley v. United States*, 118 S. Ct. 1298, 1299 (1998), to review the Third Circuit's decision that, as a matter of law, bank larceny in violation of 18 U.S.C. § 2113(b) is not a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). After the case was briefed and argued before this Court, but before a decision on the merits had been rendered, Mr. Mosley died. His untimely death led this Court to dismiss the petition without rendering a decision on the merits. *See Mosley v. United States*, 119 S. Ct. 484 (1998). The reasons supporting this Court's decision to grant review in *Mosley* – the decisional conflict among the circuits and the important problems of statutory interpretation presented when Congress defines federal crimes in terms that are rich with common law meaning and tradition – apply with equal force in this case. Certiorari, therefore, should be granted.

2. The same clear split among the circuits that prompted this Court to grant review last Term in *Mosley* persists today. Most courts of appeals that have considered the question have concluded that bank larceny is a lesser included offense of bank robbery. Others, a minority, have reached the opposite conclusion.

Since Congress codified the bank robbery and incidental crimes provisions into law, only the Third and Ninth Circuits have refused to follow the common law tradition that bank larceny constitutes a lesser included offense of bank robbery. *See Mosley*, 126 F.3d at 206; *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989). The Third Circuit itself has expressly acknowledged that its interpretation of the bank larceny statute conflicts directly with the majority of circuits, which have concluded that, just as with common law larceny and robbery, bank larceny is a lesser included offense of bank robbery. *Compare Mosley*, 126 F.3d at 206 ("Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.") *with United States v. Henson*, 945 F.2d 430, 441 (1st Cir. 1991) ("failure to instruct on the lesser charge of bank larceny" was not plain error); *United States v. Walker*, 75 F.3d 178, 180 (4th Cir. 1996) ("It is undisputed that bank larceny is a lesser-included offense of bank robbery."); *United States v. Amos*, 566 F.2d 899, 901 (4th Cir. 1977) (vacating concurrent bank larceny sentence on ground that "the convictions for less aggravated forms of bank theft merge into the conviction for the more aggravated form of bank robbery"); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir. 1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny based on the evidence, but indicating that bank larceny is a lesser included offense of bank robbery); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir. 1974) (recognizing that bank larceny is a lesser included offense of bank robbery); *United States v. Brittain*, 41 F.3d 1409, 1410 (10th Cir. 1994) (holding bank larceny is a lesser included offense of bank robbery); and *United States v. Cornillie*, 92 F.3d 1108, 1109 (11th Cir. 1996) (reviewing district court's refusal to charge jury "on the lesser included offense of bank larceny").

It is clear that the Third Circuit and Ninth Circuit have erred in concluding that bank larceny is not a lesser included offense of bank robbery. First, applying the textual elements test adopted

by this Court in *Schmuck v. United States*, 489 U.S. 705, 716 (1989), it is evident that bank larceny represents a textual subset of bank robbery, with elements identical to bank robbery save for the "force and violence or intimidation" element unique to bank robbery. Under *Schmuck*, one offense is the lesser included of another if "the elements of the lesser offense are a subset of the elements of the charged offense." *Id.* Although this Court emphasized in *Schmuck* that the analysis must be "textual," *id.* at 720, it did not hold that the exact same words that define an element in the lesser offense must appear in the definition of the element in the greater offense. The Third Circuit erred in *Mosley*, and thus in this case, by adopting the very sort of 'magic words' approach that *Schmuck* avoided. Thus, although the bank robbery provision (18 U.S.C. § 2113(a)) does not contain the phrase "intent to steal or purloin" found in the bank larceny provision (18 U.S.C. § 2113(b)), the bank robbery provision does contain terms tantamount to "steal or purloin" – namely, the phrase "takes or attempts to take from the person of another."[9] The terms employed in both provisions correspond closely to one another and are alternative means of defining the same intent element.

Second, the premise that the bank robbery statute lacks an intent element – which element the Third Circuit concluded distinguishes federal bank larceny from the federal bank robbery – runs afoul of the common law understanding of robbery, on which the statute is based. Moreover, it runs afoul of the Court's seminal decision in *Morissette v. United States*, 342 U.S. 246, 263 (1952)(*mens rea* or intent is impliedly contained in a statute codifying a common law crime). In fact, contrary to Third Circuit law but consistent with the common law interpretation of the robbery statute, the district court here even instructed the jury that it must find that a defendant had acted with "specific

---

[9]The word "steal" is commonly defined as "to take the property of another." *Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). "Purloin" is a synonym for "steal." *Id.* at 937.

intent" to show that the defendant "willfully" carried out the crime of bank robbery. (C.A. App. 252.)

This Court has recognized that criminal statutes generally "include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[10] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994) (collecting and analyzing cases on scienter requirements); *see also Staples v. United States*, 511 U.S. 600, 605 (1994) (reasoning that although the statute at issue, unlawful possession of an unregistered firearm, did not specifically contain a *mens rea* element, the statute must be construed "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded") (internal citation omitted).

Third, Congress has, since it first criminalized federal bank robbery in 1934, spoken in traditional terms that are familiar from such common law sources as Blackstone, Hawkins, and East. Nor has Congress, in modifying the bank robbery statute since that time, severed the statute's deep roots in the common law tradition. Each of the three phases that led to the codification of the bank robbery and bank larceny provisions as they presently stand – the passage of the original bank robbery act in 1934;[11] the expansion of the statute to criminalize bank larceny and unlawful entry

---

[10]The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v. United States*, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in 'limited circumstances.'" *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

[11]Bank robbery was first made a federal crime in 1934. The relevant act, in terms virtually verbatim from common law sources, stated as follows:

Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other

in 1937;[12] and the rephrasing of the act as part of the 1948 recodification[13] – preserved the common law language and meaning of bank robbery and bank larceny. Just as was the case before the 1948 recodification of the federal criminal code, the contemporary definitions of bank robbery and bank larceny hew closely to common law sources, and these sources therefore imbue these federal statutory provisions with meaning. Congress has not stated plainly or otherwise intimated that it intended to break from the common law.

Given the established common law meanings of larceny and robbery to which Section 2113 remains firmly anchored, the Third Circuit was wrong to conclude that the lack of an express intent

---

thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both. Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783, 783; *cf.* 4 William Blackstone, *Commentaries* *241 ("robbery" is "felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear[]."). The phrase "feloniously takes" signifies the intent to steal. *See United States v. Turley*, 352 U.S. 407, 410 n.4 (1957) ("felonious" means "having criminal intent"); *Black's Law Dictionary* 617 (6th ed. 1990) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal.").

[12]In 1937, Congress amended the 1934 Act to criminalize bank larceny and unlawful entry of a bank. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749, 749. In that instance, as well, Congress adopted the language of the common law. (Pet. App. 34a-35a.).

[13]In 1948, Congress recodified the bank larceny and robbery provisions as Subsections (b) and (a), respectively, of 18 U.S.C. § 2113, in substantially the same terms they have today. *See* Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, 796-97. The only textual change relevant here is the deletion of the modifier "feloniously" from the bank robbery statute. *Compare* 12 U.S.C. § 588b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another") *with* 18 U.S.C. § 2113(a) (Supp. V 1947-52) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another"). This deletion was merely a change in phraseology to eliminate unnecessary felony classifications. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir. 1982) ("Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words 'felony' and 'misdemeanor.'").

element in the robbery subsection bars the interpretation of larceny as a lesser included offense of robbery. When the common law serves as the basis for a statute, the "cluster of ideas" that makes up that common law rule supplies the meaning for common law terms in the statute. *Morissette*, 342 U.S. at 263. Absent a specific congressional pronouncement to the contrary, any superficial textual discrepancies between Sections 2113(a) and (b) must be resolved by applying the established view of the common law, adopted by Congress, that both robbery and larceny alike require proof of a specific intent to steal. *Id.*[14]

Congress employed the language of the common law to define the offenses of bank robbery and bank larceny. By adopting the common law language, Congress included the common law intent element of robbery in the statutory offense. *See United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."); *Morissette*, 342 U.S. at 263. Indeed, the title of the 1937 act adding bank larceny to the criminal code – "AN ACT To amend the bank-robbery statute to include burglary and larceny," Act of Aug. 24, 1937, ch. 747, 50 Stat. 749, 749 – also expressly adopted the familiar nomenclature of common law crimes. Consistent with this Court's decision in *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998), the use of common law terms in the title of an act to amend a criminal statute

[14]Maintaining the traditional common law understanding of bank robbery and bank larceny also comports with this Court's decision in *Jones v. United States*, 119 S. Ct. 1215 (1999). In *Jones*, the Court explained that a statute's text can only go so far in establishing legislative intent. *Id.* at 1216-17. As a result, in interpreting statutes, courts also must consider that "[s]tatutory drafting . . . occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts." *Id.* at 1216.

should resolve any doubt that Congress intended bank robbery and bank larceny to share the same specific intent element, just as they did at common law.

Finally, this Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), reinforces the conclusion that larceny is a lesser included offense of robbery. The Court determined in Prince that robbery and unlawful entry share the same criminal intent to steal, reasoning that "the heart of the crime [of unlawful entry] is the intent to steal. This mental element merges into the completed crime if the robbery is consummated." *Id.* at 328. It follows, then, that bank robbery itself requires the intent to steal, for otherwise these two offenses could not merge.

* * *

Given that the elements of both statutes are substantively identical, that the bank larceny and robbery provisions mirror the common law, and that the history of the statutes proves Congress' intent to maintain the common law meaning, it is clear that bank larceny is a lesser included offense of bank robbery. This Court should grant certiorari to correct the Third Circuit's erroneous view that bank larceny constitutes an altogether separate crime from bank robbery and therefore mend the persistent division among the courts of appeal over this very important issue.

3. A failure to grant certiorari in this case would perpetuate the unfair administration of justice in those circuits that refuse to apply the common law understanding that bank larceny is a lesser included offense of bank robbery. First, maintaining the status quo permits similarly situated defendants to be treated differently not because of their conduct, but merely as a consequence of their location. Only intervention by this Court can put an end to the unequal treatment of similarly situated defendants among the several circuits.

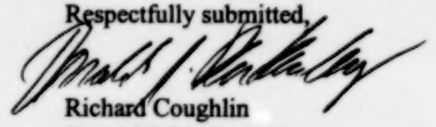
Second, allowing the view that bank larceny is not a lesser included offense of bank robbery

to stand impedes the ability of juries to determine the outcome of cases properly within their purview. As the Third Circuit recognized in *Mosley*, to hold that bank larceny is not a lesser included offense of bank robbery means that "if a jury concludes that a defendant did not use force and violence or intimidation in a bank robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery." 126 F.3d at 206 n.6. Such a decision places juries in the awkward position either of acquitting defendants who obviously committed some crime, or of convicting a defendant of an offense that is unduly severe. It also strips the jury of its role as mitigator because it stifles a jury's ability to protect against the "potential or inevitable severity of sentences" when the issues surrounding a prosecution point to "political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." *Jones*, 119 S. Ct. at 1225.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Jeffrey T. Green
Joseph S. Miller
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

Richard Coughlin
Donald J. McCauley*
FEDERAL PUBLIC DEFENDER
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner

*Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,
Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1(a) May 19, 1999

Before: BECKER, Chief Judge, RENDELL and ROSENN, Circuit Judges.

(Filed)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a).

RECEIVED
AUG 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

P. Douglas Sisk, Clerk

Dated: June 16, 1999

Certified as a true copy and issued in lieu
of a formal mandate on July 13, 1999

Teste:

Clerk, United States Court
of Appeals for the Third Circuit

UNREPORTED - NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,
Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1(a) May 19, 1999

Before: BECKER, Chief Judge, RENDELL and ROSENN, Circuit Judges.

(Filed JUN 16 1999)

George S. Leone
Office of United States Attorney
970 Broad Street, Room 700
Newark, NJ 07102

Norman J. Gross
Office of United States Attorney
4th & Cooper Streets
Mitchell H. Cohen Courthouse
One John F. Gerry Plaza
Camden, NJ 08101
Counsel for Appellee

Brian P. Reilly

RECEIVED AND FILED
6/16/99
P. DOUGLAS SISK,
CLERK

Office of Federal Public Defender
22 South Clinton Avenue
Station Plaza #4, 4th Floor
Trenton, NJ 08609
Counsel for Appellant

MEMORANDUM OPINION

ROSENN, Circuit Judge.

Appellant Floyd J. Carter and Terry Stillwell were charged in a one-count indictment with bank robbery in violation of 18 U.S.C. § 2113(a) in the United States District Court for the District of New Jersey. Stillwell pleaded guilty and, on January 23, 1998, a jury found Carter guilty of bank robbery. On October 15, 1998, the district court sentenced the defendant, Carter, to 215 months in prison.[1] Defendant appealed. We affirm.

I.

At approximately 2:00 p.m. on September 9, 1997, the defendant entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, wearing several layers of clothing and a ski mask that covered his entire face except for his eyes and mouth. As he entered, a customer, Maria Zahn, was leaving. Ms. Zahn attempted to exit

---

[1]The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and this court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(1) and (2).

around him, but the defendant pushed her back inside. Ms. Zahn was so terrified that she screamed, startling others within the bank.

At that point, Carter ran toward the customer service counter, and with a single leap, vaulted over the counter and through one of the teller windows to the area behind the counter where tellers Anastasia Hairston, Christine Sentech, and Mildred Calacal were standing. Ms. Hairston ran to the office of the branch manager, Robert Phipps, yelling that a robber was after her. Meanwhile, the defendant opened Ms. Hairston's teller drawer and emptied money into a brown paper bag. He then quickly moved to within two feet of where Ms. Sentech and Ms. Calacal stood and proceeded to empty their teller drawers. Meanwhile, Ms. Zahn ran out of the bank, got into her car, laid down on the floor and prayed until the authorities arrived.

After having removed almost $16,000 in currency from the teller drawers, the defendant hurdled back over the teller counter and warned that no one was to follow him. He ran to a getaway car operated by Terry Stillwell, climbed into the trunk, and closed the hatch. The car then sped off. A short while later, the police arrived. At that point, a description of the getaway car was broadcasted over police radio. Eventually, other officers stopped the getaway car and apprehended Carter and his disguise. The defendant subsequently waived his Miranda rights and confessed to FBI special agent James Maxwell that he and Stillwell had driven to Hamilton Township from New Brunswick to rob the bank.

II.

The defendant's primary issue on appeal is the district court's decision to reject his request to instruct the jury on bank larceny. The district court's decision to reject his request is subject to plenary review. See United States v. Price, 13 F.3d 711, 724 (3d Cir. 1994).

A.

The defendant argues that, even though not charged in the indictment, bank larceny is "a lesser included offense" of bank robbery for purposes of Fed. R. Crim. P. 31(c). He therefore contends that the jury should have been instructed on bank larceny because the theory of his defense at trial was that he took money from the bank without force, violence, or intimidation.

The district court denied the defendant's request on the ground that this court in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), issued shortly before Carter's trial, held that bank larceny is not a lesser included offense of bank robbery. In Mosley, this court remarked that under Section 2113(a) "the subjective intent of a bank robber to steal is irrelevant; 'the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes.'" Mosley, 126 F.3d at 204 (quoting United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976)). Conversely, the Mosley court observed that under Section 2113(b), the perpetrator must have the "intent to steal or purloin to satisfy the elements of bank larceny." Mosley, 126 F.3d at 204.

The defendant asserts that even under Mosley the district court still was obligated to instruct the jury on the defense's theory that he committed bank larceny, not bank

robbery. We disagree. Mosley rested solely on the legal interpretation of Sections 2113(a) and (b). See 126 F.3d at 204. We conclude that the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in Mosley appropriately rested solely on a legal interpretation of Sections 2113(a) and (b). See 126 F.3d at 204.

Notwithstanding the holding in Mosley, the defendant contends that we should reconsider that decision. He argues that an examination of the language of the statute reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. He notes that the word "purloin" is a synonym of "steal" and that the text of the statute with respect to these terms alternatively defines the same element. He also claims that absent a clear and specific statement by Congress that a particular criminal statute does not require a mens rea, this element of intent is presumed to exist. Consequently, he submits that omission of the mens rea requirement in the text of the bank robbery statute raises a presumption that mens rea is a requisite element of bank robbery. Thus, he submits that the intent to steal is an element of both bank larceny and bank robbery. Finally, he contends that the Mosley decision was based on a mistaken and incomplete consideration of the common law history of bank robbery and bank larceny, and an incorrect application of the relevant case law. We disagree with the defendant in all respects because Congress created a statutory crime of robbery that is set forth fully in Sections 2113(a) and (b).

First, in Brown, this court held that specific intent is not an essential element of a violation of Section 2113(a). Second, under the modern robbery statute, Congress did not use the language of the common law to define the offenses of bank robbery and bank larceny. See Bell v. United States, 462 U.S. at 360 (citing Turley, 352 U.S. at 411-412). Finally, Section 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property. Accordingly, we conclude that our decision in Mosley need not be disturbed.

B.

The defendant also contends that the district court misinterpreted and misapplied United States Sentencing Guideline Section 3E1.1 in denying him a reduction in the offense level because he accepted responsibility for the offense. He submits that he accepted responsibility for his criminal conduct for purposes of Section 3E1.1 because he conceded at trial that he committed bank larceny, but denied that his conduct amounted to the offense of bank robbery because he did not use force, violence, or intimidation.

The district court's decision to deny the claim for acceptance of responsibility is reviewed for clear error. See United States v. Muhammad, 146 F.3d 161, 167 (3d Cir. 1998). The reduction for acceptance of responsibility generally does not apply to a defendant "who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, Application Note 2. At trial, Carter challenged the testimony of Ms. Zahn, claiming that his physical contact with her was wholly accidental, and that

she did not scream. He attacked the Government's evidence as to his threatening remark as he fled from the bank. Finally, in his summation, he argued that there was no implicit threat of violence or injury to discourage a pursuit. These challenges to the Government's case are inconsistent with an acceptance of responsibility.

Accordingly, we conclude that the district court committed no error in rejecting defendant's request for a reduction in his offense level. See United States v. DeLeon-Rodriguez, 70 F.3d 764, 767 (3d Cir. 1995)(district court properly denied acceptance reduction after appellant pleaded not guilty and contested his factual guilt beyond a mere legal challenge); United State v. Veksler, 62 F.3d 544, 551 (3d Cir. 1995).

C.

Lastly, the defendant contends that the district court erroneously denied his motion for acquittal pursuant to Fed. R. Crim. P. 29 because the Government failed to establish that he used force, violation, or intimidation to perpetrate the predicate offense. When a jury returns a verdict, this court's review is plenary and, in employing that review, we must view the evidence in the light most favorable to the Government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Burks v. United States, 437 U.S. 1, 17 (1978); United States v. Leon, 739 F.2d 885, 890 (3d Cir. 1984).

To obtain a conviction for unarmed bank robbery under Section 2113(a), the Government must prove that the defendant: (1) used force and violence or intimidation; (2) took or attempted to take from the person or presence of another, (3) money, (4) in the

care, custody, or control of a federally insured bank. To establish "intimidation" under Section 2113(a), the Government need show only that "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." Untied States v. Woodrup, 86 F.3d 359, 363 (4th Cir. 1996). The evidence shows that the defendant wore a ski mask that covered his entire face except for his eyes and mouth, and that he gained access to the teller cages by forcefully, speedily, and impermissibly vaulting the customer service counter. These abnormal activities plainly were acts of intimidation, as well as his exertion of force on Ms. Zahn. We see no error in the district court's denial of the defendant's motion for acquittal.

III.

For the foregoing reasons, the judgment of conviction and sentence of the court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Not only do we survive or meet the Rule 29 standard, but this evidence will establish his guilt beyond a reasonable doubt and so, therefore, I would respectfully request that the motion be denied and we submit this case to the jury.

THE COURT: Mr. Reilly, do you have anything in response?

MR. REILLY: Your Honor, I just want to make one comment, and indicating in response to the Government's argument that the mask in itself is intimidation. The law is that intimidation involves conduct that is reasonably calculated to instill fear of bodily harm. I don't think that that intimidation occurred in this case, and there's no evidence in this case that that intimidation occurred. And I submit that the motion should be granted.

THE COURT: There's no dispute about the standard for the Court's evaluating a Rule 29 motion is that the evidence must be viewed in a light most favorable to the Government who is the non-moving party. And that the question is whether a reasonable jury could find in favor of the Government on the charge presented beyond a reasonable doubt.

The arguments of counsel have accurately reviewed what are basically uncontroverted facts. But I will review the evidence as well.

There is ample evidence in this even brief trial establ charge. It has been established by the evidence that the

defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank on the date in question. That's the first element.

The second element, likewise, has been satisfied. It has been established through the testimony of the bank manager, Mr. Phipps, as well as the corroborating testimony of an officer of Hamilton Township that the money that Mr. Carter was found with was, in fact, the money which had been taken from the management and possession of the bank. There was bait money involved and the serial numbers of the bait money were maintained by the bank and found on at least 50 of the -- exactly 50 of the bills that were in Mr. Carter's possession when he was apprehended directly after the incident at the bank.

And, of course, through the bank manager, the Government has established that the bank and its deposits were insured by the FDIC at the time of the incident.

And so, the issue here will boil down to whether the evidence presented, a reasonable jury could find beyond a reasonable doubt that Mr. Carter took this money by means of force, violence or intimidation. And here again, the facts are relatively -- the essential facts are uncontroverted but they have been established through the evidence.

The first witness was Maria Zahn, who was a customer at the time of the incident. She testified that on the date in

question which was September 9, 1997, it was a nice day. The weather was fairly warm. She had completed her business at the teller window at approximately 2:00 and was exiting the bank in order to pick up her children from school.

As she approached the exit door of the bank, she was confronted face-to-face by a person entering that door from the right who was wearing a knitted ski mask and heavy winter clothing. He opened the door and she immediately wanted to run out. He grabbed her physically with both hands and pushed her inside, saying, hold on. In other words, restraining her exit from the bank and then moved her or turned her in such a way as to spin her out of his way as he rapidly entered the bank. And with that, he said move over.

She also testified here that she screamed upon having that encounter. He rapidly moved on past her. She watched him as he moved in the direction of the tellers. After that her part in this scenario was over.

The next witness to testify was a customer service rep named Marjorie Kudney, and she was sitting at a customer service desk directly inside the door in question and she had a cubicle of sorts which gave her complete vision of the lobby area of the bank and the teller windows. And so she was an observer of these events rather than a direct participant.

She said that she first noticed anything irregular when she heard a scream. She looked up and saw a lady, a

customer exiting through that door and then she immediately looked to her right and saw a man jumping over the counter into the teller stations. She described the man, also, as wearing a mask and dark clothes. Then she said that this man walked behind the teller area and appeared to be taking money from the teller stations. She was also seated at her desk throughout this brief episode. And as the man left, she said that she heard the man say, don't follow me. And she indicated that she was feeling nervous and a little frightened having witnessed this.

The cross examination brought out that she had -- Ms. Kudney had indicated to the police that at no time was she in fear for her life and that she saw no weapon and heard no threats except the last statement which was not to follow him. She heard no demands being made by him. She did interpret the last statement as sort of a threat and also she stated on re-redirect that although she was not in fear of her life, she was in fear at that sequence of events.

The next witness to testify was Mildred Kalikal; she was one of the tellers. She was there at the teller station at approximately 2:00, assisting a male customer, and all of a sudden she saw the man described jumping over the counter at Ms. Hairsten's station which was two down from her. She testified that Ms. Senteck's station was the one immediately to her left and that after the man had jumped over at Ms.

Hairsten's station, Ms. Hairsten had run from her teller station to the branch manager's office and that the man had gone to Senteck's station, opening the drawers of Senteck's teller equipment station and -- both top and bottom drawers, he opened -- and he took the money out of those drawers and put it in a brown grocery bag.

Ms. Kalikal testified that while this was occurring at Ms. Senteck's station, Ms. Senteck was at her station crying and trembling. Ms. Kalikal also said that as this was transpiring, the man in the mask said to all of them -- at this point it would be two of them -- that he wouldn't hurt anybody.

Ms. Kalikal also testified, over the objection of defendant, that as she witnessed this sequence of events and as he then came to her drawer, standing about two feet from her, she felt scared. She was afraid that there might be a weapon. And although the man said that he wouldn't hurt anyone, she was still afraid. She had never encountered anything like that in all her life. She was really scared; did not know what to do and she stood motionless while the man proceeded to open her top drawer, moving quickly, and removing money from that drawer and putting it in his bag.

She also witnessed him leaving saying that no one should follow; and she perceived this as a threat, such that if anyone did follow, he might hurt them.

She did confirm that she was not verbally threatened

and that no demands were made to her.

The branch manager Mr. Phipps testified he had his own office, which gave him full view of the lobby because he had an interior glass window and his door was opened at the time. He was sitting at his desk when he heard a loud bang, and then a blur, via monitor, running across the lobby, which he perceived as a man. As the man reached Ms. Hairsten's station, he saw the man leap into Ms. Hairsten's station by jumping in one leap -- he hurtled the counter in one leap.

Mr. Phipps was not quite sure how this man negotiated the ropes and stanchions, which indicated the line for the customers, but he did confirm that the man ran toward the teller counter and that he jumped over at the location of Ms. Hairsten's counter, whereupon Ms. Hairsten ran into Mr. Phipps' office saying he's after me, and also saying my purse is still there.

At that point Mr. Phipps replied to her that in Mr. Phipps' observation the man was not after Ms. Hairsten, he was after the bank's money and not after her purse. He was after the banks' money.

At that point Mr. Phipps pressed the alarm while he witnessed the man going to the several teller drawers, taking the money and then exiting by leaping over the same counter from which he had entered and going out of the bank.

He said he was upset and scared while all this

occurred and that when the man left he described that the tellers were frozen and that while he had taken the money, according to his testimony, he perceived that those particular tellers were scared to death and that they stood there without looking at the man.

He confirmed also that no weapons were used in this incident and that he heard no demands while the man was taking the money. He also confirmed -- I'm not sure whether he corroborated the testimony of the others, which is undisputed -- that as the man left he said don't follow.

Mr. Phipps provided additional testimony to the effect of what he did in order the manage the bank once the man left. Namely, he had the interior lock thrown so that everyone within the bank was secure and then he started the investigational procedures, including with the customer who had been standing at Ms. Kalikal's station at the time.

The testimony of Officer Inman (sic) had to do with the apprehension and putting in the various physical items of evidence so they do not go to the events within the bank, except that they do confirm what the defendant was wearing; namely, that when he was apprehended he had in his possession a black ski mask and that he was wearing not only heavy clothing, but several layers of clothing, including at least two layers of pants as possible outer-wear.

Special Agent, F.B.I. Agent James Maxwell testified

that he interviewed the defendant immediately after the arrest and after providing him with his rights and having him also read a waiver statement, which was signed and witnessed at 3:05 p.m., less than an hour after the incident.

Among other things, as reported by Agent Maxwell, the defendant did admit taking the money; he did admit entering the bank for that purpose, but said that he went to the bank to snatch the money and that he went into the bank so that he could take the money.

I have reviewed again the Mosley case, this time from the standpoint of what sorts of facts could support a conviction on what is called bank robbery, which is found at 18 U.S.C. Section 2113(a). The indictment in this case does charge that offense.

It does not charge the offense set forth at 18 U.S.C. Section 2113(b), which is known as bank larceny, and earlier we were discussing defendant's motion that this case should be regarded as, at least, potentially including the bank larceny charge as a lesser included offense. We will get to that again, of course, as we deal with the jury charge, but the Mosley case does set forth the facts of the two robberies which were involved in Mosley which resulted in convictions on the bank robbery charge. It also discussed the difference between bank robbery and bank larceny as envisioned by Congress in passing these in two separate provisions.

In the Mosley incident there was a confrontation of tellers at the a First Fidelity Bank on November 20, 1995; and a different First Fidelity Bank on November 9, 1995, which were charged in that case.

In the first count offense the individual had approached the teller window, leaned toward her and said this is a hold up and instructed her to open the drawer and give him the money and the teller did so, while he was telling her to hurry, hurry, and get the big bills first.

At that case there was a gesturing by the defendant as if he had something there, but there was no weapon actually used or brandished or mentioned.

In the second incident the same man entered the different bank on a different date with a sign reading "hold up" and approached the teller station. The teller testified that Mosley placed both of his hands on the counter and said can I have all your money, with the perpetrator using a defensive, but demanding, tone of voice. She gave him first bait money, which he threw back at her and then she gave him the other money and the defendant walked out at a fast pace and the teller walked away at that point, in that circumstance.

So those were confrontations. They did involve demands, which this case did not. They did not involve weapons, and neither did this case.

In the discussion of the Third Circuit Court of

Appeals in the Mosley decision in which they did find, of course, that as a matter of law in this Circuit it is their view that the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense; and, of course, the Mosley case did recognize that in reaching that conclusion they find themselves in the minority of circuits, at least at this time.

They explained by reference to earlier cases, both in another circuit and in our United States Supreme Court, the legislative history of the bank larceny statute, Section 2113(b); and in brief reference, I am reviewing it because I think it sheds some light on what is the distinction between bank larceny and bank robbery.

They said that Congress initially passed the bank robbery legislation, now found as Section 2113(a), in 1934 and declined at that time to pass a bank larceny provision which had been proposed. They added the larceny provision three years later, according to the Mosley decision, in reaction to a case in which a man walked into a bank and without confronting any bank employees helped himself to $11,000.

Thus, said Mosley, the larceny statute seems designed to address a different factual scenario than the typical bank robbery case.

I have followed up by looking at the Supreme Court

case which sets forth this history of the bank larceny statute, and that is found in Bell v. United States, 462, U.S. 356. The Mosley case particularly refers to Section 365, Note 4 of that decision, which is found in Justice Steven's opinion dissenting; however, the history of the statute is found in that dissenting opinion and the facts in the case referred to -- I will read that footnote, which is a quote from the Congressional Record (1937). The Congressional Record says;

> " The fact that the statute [as of 1937 that was] is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees without displaying any force or violence and without putting anyone in fear, which are necessary elements of the crime of robbery, and was about the leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute..."

So it is conceivable, it seems to me, that a person could commit bank larceny while walking into a bank and not have that taking rise to the level of bank robbery, even if it

is not a taking by trickery such as cheating a bank teller out of money by presenting a bad check or something.

However, the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case that, objectively speaking, the behavior of Mr. Carter was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense.

For those reasons, and with due regard to the able and I think very effective presentation by counsel for the defendant, I deny the motion which has been brought under Rule 29.

At this point we do anticipate that the Government will rest and, Mr. Reilly, you have your opportunity to present any case that you wish on behalf of your defendant after that.

MR. REILLY: Okay. Judge, did you want to do the jury charges now or will we do it --

THE COURT: Well that's what I'm thinking. Again, because we'll bring the jury out and if both sides are going to rest then they will leave.

MR. REILLY: If I could just have a minute on that last issue, Judge.

(46)

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

Case Number 3:97-CR-520 (NJ)
3:98-CR-475 (PA)

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (Cr. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400 , $100 each on count(s) 1 of indictment in Cr.97-520,and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 27th day of October, 1998.

ENTERED
on THE DOCKET
on 10-28 1998
WILLIAM T. WALSH, CLERK
By _____ (Deputy Clerk)

FILED
OCT 28 1998
AT 8:30 _____ M
WILLIAM T. WALSH
CLERK

Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 120 months on Counts 1-3 of Cr. 98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall refrain from the excessive use of alcohol and shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
2) The defendant shall not illegally possess a controlled substance.
3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.
4) The defendant shall not leave the judicial district without the permission of the court or probation officer.
5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
7) The defendant shall support his or her dependents and meet other family responsibilities.
8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

RESTITUTION AND FORFEITURE

RESTITUTION

Restitution in the total amount of $11,993.00 to be divided proportionately to reflect half of the amount of loss sustained by the Sovereign Bank, 1102 Taylorsville Rd., Washington Crossing, NJ and First Federal Savings and Loan Association, 272 W. Bridge St., New Hope, PA

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	VI
Imprisonment Range:	210 months to 240 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ to $ 17,500
Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By _____
Deputy Clerk

(a)

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

Case Number 3:97-CR-520
3:98-CR-475

FILED

DEC 0 8 1998

AT 8:30
WILLIAM T. WALSH
CLERK

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (Cr. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400 , $100 each on count(s) 1 of indictment in Cr.97-520,and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4th day of December, 1998.

ENTERED
on
THE DOCKET
on 12/8 1998
WILLIAM T. WALSH, CLERK
By _____
(Deputy Clerk)

Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 24 months on Counts 1-3 of Cr. 98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall refrain from the excessive use of alcohol and shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
2) The defendant shall not illegally possess a controlled substance.
3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.
4) The defendant shall not leave the judicial district without the permission of the court or probation officer.
5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
7) The defendant shall support his or her dependents and meet other family responsibilities.
8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

RESTITUTION AND FORFEITURE

RESTITUTION

Restitution in the total amount of $11,993.00 to be divided proportionately to reflect half of the amount of loss sustained by the Sovereign Bank, 1102 Taylorsville Rd., Washington Crossing, NJ and First Federal Savings and Loan Association, 272 W. Bridge St., New Hope, PA

Defendant: FLOYD J. CARTER a/k/a "Daniel O'Reilly"
Case Number: 3:97-CR-520

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	VI
Imprisonment Range:	210 months to 240 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ to $ 17,500
Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By: _____
Deputy Clerk

Appendix – Statutory Provisions Involved

I. Present-Day Provisions

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny —

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or

agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

18 U.S.C. § 2113 (1994 & Supp. III).

II. Provisions Prior To 1948 Recodification Of Criminal Code

§ 588b. Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods.

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of

subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

12 U.S.C. § 588(b) (1940).

III. 1948 Provision On Classification Of Offenses

§ 1. Offenses Classified.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 U.S.C. § 1 (Supp. V 1947-52).

ORIGINAL

No. 99-5716

Supreme Court, U.S.
FILED
NOV 17 1999
CLERK

RESPONSE REQUESTED

IN THE SUPREME COURT OF THE UNITED STATES

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RECEIVED
SUPREME COURT, U.S.
CLERK'S OFFICE
1999 NOV 17 P 1:33

12 pt

QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b) (Supp. IV 1998), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-5716

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999. The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one

count of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to 215 months' imprisonment to be followed by three years' supervised release. Pet. App. 4a, 24a-25a.[1]

1. On September 9, 1997, at approximately 2 p.m., petitioner entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, through the door adjacent to the parking lot. Despite the warm weather, he was wearing several layers of clothing and a ski mask that covered almost his entire face. Encountering a customer who was leaving the bank, he pushed her twice, and ordered her to "move over." The customer screamed, alerting other occupants of the bank to petitioner's presence. Pet. App. 4a-5a; C.A. App. 29-32.

Petitioner then ran towards the customer service counter and vaulted over the counter and through one of the teller windows to the area behind the counter. He seized money from several teller drawers and stuffed it into a brown paper bag. Pet. App. 5a. He then moved to within two feet of where two tellers stood and emptied their teller drawers. Ibid. According to one of the tellers, he said he "wouldn't hurt nobody." C.A. App. 79.

---

[1] Petitioner previously had pleaded guilty to an indictment charging three counts of bank larceny, in violation of 18 U.S.C. 2113(b), in the United States District Court for the Eastern District of Pennsylvania. The case was transferred, pursuant to Federal Rule of Criminal Procedure 20, to the District of New Jersey for sentencing. He was sentenced on those convictions to a concurrent term of 120 months' imprisonment. Pet. App. 23a-24a.

Nevertheless, two of the tellers testified that they were "scared to death," and one was crying and trembling. Gov't C.A. Br. 3. After removing almost $16,000 in currency, petitioner hurdled back over the teller counter and warned the bank's occupants not to follow him. Police arrested him shortly thereafter. During a subsequent interview, petitioner confessed that he had taken money from the bank. Pet. App. 5a.

Petitioner's defense was that he committed only bank larceny, not bank robbery. He sought to show through his own testimony and cross-examination of the government's witnesses that he did not use intimidation to obtain the bank's money. He challenged the customer's testimony that she had screamed upon encountering petitioner, and that he twice had pushed her. C.A. App. 157-158. According to his account, he wore the ski mask to conceal his identity, and was under the mistaken belief that no customers were in the bank when he entered it. C.A. App. 155-156. He said that he specifically avoided confronting the tellers and first approached a vacant teller station because he did not want to scare the tellers. C.A. App. 159-160. He reassured the tellers that he was "not gonna hurt anybody," and just wanted the money. C.A. App. 161. Finally, after stealing the money, he jokingly told the occupants not to follow him because "I run fast." C.A. App. 164.

Following the close of the government's case, petitioner

sought an acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Specifically, he argued that the government had not proved that he obtained the bank's money through "force, violence, or intimidation," as required by 18 U.S.C. 2113(a). Pet. App. 9a. The court denied the motion, finding sufficient evidence of intimidation. The court went on to discuss the Third Circuit's decision in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), cert. granted, 523 U.S. 1019, cert. dismissed, 525 U.S. 120 (1998), which held, as a matter of law, that bank larceny is not a lesser-included offense of bank robbery. Relying on Mosley, the court also denied petitioner's request for a jury instruction on bank larceny. Pet. App. 11a-22a. It did, however, charge the jury that "the defense theory of the case" was that "no conduct of the defendant was reasonably calculated to instill fear of bodily harm." C.A. App. 254.

2. The court of appeals affirmed. Following Mosley, the court held that petitioner was not entitled to a bank larceny instruction because bank larceny is not a lesser-included offense of bank robbery. It emphasized that its holding in Mosley was a legal one, resting "solely on a legal interpretation of Sections 2113(a) and (b)." Pet. App. 7a. It declined to reconsider its decision in Mosley, finding that specific intent, while an essential element of a violation of Section 2113(b), is not a requisite element of bank robbery. The court also rejected

petitioner's claim that the evidence did not sufficiently establish that petitioner used force, violence or intimidation to steal the money. Pet. App. 7a-8a, 10a.

DISCUSSION

Petitioner contends (Pet. 7-15) that the court of appeals erred in holding that a bank larceny instruction was not required on the ground that bank larceny is not a lesser-included offense of bank robbery. He notes that this Court had granted certiorari in Mosley, but that the Court ultimately dismissed the petition because Mosley died before the case was decided. Because the legal issue in this case is identical to that of Mosley, and because the Court granted the petition in that case to decide the question presented, the petition in this case should be granted.

1. The court of appeals relied on Mosley, which correctly held that bank larceny is not a lesser-included offense of bank robbery. Under the test for determining greater and lesser offenses set forth in Schmuck v. United States, 489 U.S. 705 (1989), the controlling question is whether the elements of one offense are a subset of the elements of the other offense. Because the putative lesser offense of bank larceny under 18 U.S.C. 2113(b) (Supp. IV 1998) has statutory elements that are omitted from the bank robbery offense in 18 U.S.C. 2113(a), bank larceny is not a lesser-included offense.

Section 2113(a) defines bank robbery, in pertinent part, as

follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

Section 2113(b) (Supp. IV 1998) defines bank larceny, in pertinent part, as follows:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association.

Under the "elements" test, bank larceny is not a lesser-included offense of bank robbery because bank larceny has three textual elements that are omitted from the bank robbery offense: (1) an intent to steal; (2) a "carries away" actus reus element; and (3) a requirement that the property taken have a monetary value. The text of a federal statute ordinarily defines its elements. See Bates v. United States, 522 U.S. 23 (1997) (specific intent to injure or defraud is not an element of the offense of misapplication of funds); United States v. Wells, 519 U.S. 482 (1997) (materiality is not an element of false statement to a federal bank offense). And, when Congress includes certain language in one section of a statute and omits it in another, Congress is presumed to act deliberately in the disparate inclusion or exclusion. Russello v. United States, 464 U.S. 16,

23 (1983). Despite the common law status of robbery and larceny as greater and lesser offenses, nothing in the legislative history of Section 2113 indicated that Congress intended to codify the common law requirement of intent to steal in the bank robbery statute. Nor is there justification for reading the "carries away" or valuation elements of bank larceny into the bank robbery offense.

Nevertheless, the courts of appeals have reached conflicting conclusions on the question whether bank larceny is a lesser-included offense of bank robbery. The Third Circuit's holding is supported by the Ninth Circuit. See United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989). In contrast, the First, Fourth, Fifth, Seventh, and Eighth Circuits have stated to the contrary. See, e.g., United States v. Sandles, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996); United States v. Walker, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); United States v. Smith, 40 F.3d 933, 935 (8th Cir. 1994); United States v. Henson, 945 F.2d 430, 440-441 (1st Cir. 1991); United States v. Flint, 534 F.2d 58, 60 (5th Cir.) (per curiam), cert. denied, 429 U.S. 924 (1976).[2]

---

[2] In United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) (per curiam), the court affirmed the district court's ruling denying the requested lesser-included offense instruction on the ground that the evidence did not support the defendant's contention. The court did not address the issue whether, as a matter of law, bank larceny is a lesser-included offense of bank robbery.

In United States v. Brittain, 41 F.3d 1409 (1994), the Tenth Circuit ruled by a divided vote that bank larceny is a lesser-included offense of bank robbery. The lead opinion indicated that bank larceny was probably not a lesser-included offense of bank robbery under Schmuck, but expressed the view that the court was compelled to follow pre-Schmuck circuit precedent to the contrary. 41 F.3d at 1410-1416 (opinion of Brown, S.D.J). A concurring judge concluded that the two crimes are greater and lesser offenses under Schmuck. Id. at 1416 (Ebel, J., concurring). The dissenting judge opined that the two offenses are not greater and lesser offenses under Schmuck. Id. at 1416-1417 (Baldock, J. dissenting). The split opinions in Brittain demonstrate the range of views on this issue.[3]

---

[3] We note that this case is also like Mosley in that, even if bank larceny is found to be a lesser-included offense of bank robbery, petitioner here would not be entitled to a bank larceny instruction on the facts presented. Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. Keeble v. United States, 412 U.S. 205, 208 (1973). In this case, petitioner asked for and received an instruction to the jury that "the taking occurred without the use of force, violence, or intimidation." C.A. App. A254. Because the jury rejected that finding, there is no factual dispute that, if resolved in the defendant's favor, would result in a conviction on the lesser offense. See Sansone v. United States, 380 U.S. 343, 350-351 (1965). Thus, even if this Court were to conclude that bank larceny is a lesser-included offense of bank robbery as a matter of law, petitioner would not benefit from that ruling because he cannot establish the prerequisites under Federal Rule of Criminal Procedure 31(c) for the instruction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

KIRBY A. HELLER
Attorney

NOVEMBER 1999

BEST AVAILABLE COPY

IN THE SUPREME COURT OF THE UNITED STATES

NO. 99-5716

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES**, by first class mail, postage prepaid, on this 17th day of November, 1999.

DONALD J. MCCAULEY
FEDERAL PUBLIC DEFENDER
972 BROAD STREET
NEWARK, NJ 07102

JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006

Seth P. Waxman/ls

SETH P. WAXMAN
Solicitor General
Counsel of Record

RECEIVED
SUPREME COURT, U.S.
CLERK'S OFFICE
1999 NOV 17 P 4:32

November 17, 1999

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

DONALD J. MCCAULEY*
Assistant Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347
Counsel for Petitioner

SETH P. WAXMAN*
Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530
(202) 514-2201
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed August 12, 1999
Certiorari Granted December 13, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

91 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment, September 12, 1997, in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520 2

Petitioner's Letter Brief and Written Request to Charge Jury on Bank Larceny in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520 4

Transcript of Proceedings, January 20, 1998 [pp. 26-30], Petitioner's Oral Request to Charge Jury on Bank Larceny in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520..... 10

Transcript of Proceedings, January 22, 1998 [pp. 2-20], Motion For Judgment of Acquittal Pursuant to *Fed. R. Crim. P.* 29 in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520..... 16

Transcript of Proceedings, January 22, 1998 [pp. 71-79], Jury Charge Conference in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520 35

Transcript of Proceedings, January 22, 1998 [pp. 117-138], District Court's Jury Charge on Bank Robbery only, in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520..... 44

Judgment in a Criminal Case, October 28, 1998, in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520..... 64

Amended Judgment in a Criminal Case, December 8, 1998, in *United States v. Floyd J. Carter*, U.S. District Court, D.N.J., Criminal No. 97-520..... 71

TABLE OF CONTENTS – Continued

Page

Judgment of the United States Court of Appeals for the Third Circuit, June 16, 1999, in *United States v. Floyd J. Carter*, Criminal No. 98-5491 79

Memorandum Opinion of the United States Court of Appeals for the Third Circuit, June 16, 1999, *United States v. Floyd J. Carter*, No. 98-5491..... 80

Order of the Supreme Court of the United States granting petitioner's motion for leave to proceed in forma pauperis and petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, *Floyd J. Carter v. United States*, December 13, 1999, No. 99-5716..... 88

FLOYD J. CARTER V. UNITED STATES
NO. 99-5716

RELEVANT DOCKET ENTRIES*
Criminal No. 97-520 (D.N.J.)

Date	Proceedings
9/12/97	Indictment filed.
9/18/97	Defendant's arraignment and plea of not guilty.
1/21/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury.
1/22/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury.
1/23/98	Trial before the Honorable Mary Little Parell, United States District Judge for the District of New Jersey and a jury. Testimony concludes.
1/23/98	Jury verdict of guilty.
10/15/98	Sentencing of Defendant.
10/21/98	Defendant's Notice of Appeal filed.
10/28/98	Judgment in a Criminal Case entered.
12/8/98	Amended Judgment in a Criminal Case entered.

*Text of entries edited for clarity.

970 /hek

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Crim. No. 97-520 (MLP)
	:	18 U.S.C. §§ 2113(a) & 2
v.	:	
	:	
FLOYD J. CARTER	:	
and	:	
TERRY A. STILWELL	:	

INDICTMENT

(Filed Sep. 12, 1997)

The Grand Jury, in and for the District of New Jersey, sitting in Newark, charges:

On or about September 9, 1997, at Hamilton Township, in Mercer County, in the District of New Jersey, and elsewhere, the defendants,

FLOYD J. CARTER
and
TERRY A. STILWELL

did knowingly and willfully, by force and violence and by intimidation, take from the person and presence of a teller approximately $14,000 belonging to and in the care, custody, control, management, and possession of the Collective Savings Bank, 3144 South Broad Street, Hamilton Township, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

A TRUE BILL

/s/ Illegible
FOREPERSON

/s/ Faith S. Hochberg
FAITH S. HOCHBERG
United States Attorney

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW JERSEY

RICHARD COUGHLIN FEDERAL PUBLIC DEFENDER
TONIANNE J. BONGIOVANNI FIRST ASSISTANT

22 South Clinton Avenue
Station Plaza 4, 4th Floor
Trenton, NJ 08609
(609) 898-2160 Telephone
(609) 989-2153 Facsimile

January 20, 1998

Honorable Mary Little Parell
United States District Judge
Clarkson S. Fisher Federal Building
and United States Courthouse
402 East State Street
Trenton, New Jersey 08608

RE: *United States v. Floyd Carter*
Criminal No. 97-520

Dear Judge Parell:

Please accept this letter in support of a more formal memorandum setting forth the law requiring the submission of the charge of bank larceny to the jury in this case. The proposed charge is attached as Exhibit 1.

① Lesser Included Offense

Bank Larceny, 18 U.S.C. §2213(b) is a lesser include [sic] offense of Bank Robbery, 18 U.S.C. §2213(b). Both provisions come under the title "Bank Robbery and Incidental Crimes." An "elements" test was established in *Schmuck v. United States*, for determining whether an offense is "necessarily included in the offense charged,

489 U.S. 705 (1989). Under the "elements" test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser offense must be a "subset" of the offense charged. Id. At 714. Comparison is appropriately conducted be [sic] reference to the statutory elements of the offense in question. Id. At 718. The comparison must be textual. Id. at 720.

Undoubtedly the government will rely on *United States v. Mosley* (No. 96-5832 decided September 18, 1997, Third Circuit), to argue that bank larceny is not a lesser included offense of bank robbery (Exhibit 2). However, *Mosley* is in direct conflict with the holdings of the Court of Appeals in the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. (Cases listed Mosely Pg 10-11). A petition for a writ of certiorari challenging the propriety of *Mosley* is pending. *Mosley* also is factually distinguishable from the present case.

In *Mosley* the first charged bank robbery, Mosley told the teller "This is a hold-up" and demanded all big bills. Mosley gestured to his coat as if he had a weapon. The teller wet her pants while responding to Mosley's demand to "hurry". In the second charged bank robbery Mosley handed over a note to the teller which said in bold print "HOLD UP". He threw the "bait money" back at the teller and demanded more. In the present case no threats, gestures, demands or force are present.

In the Mosley analysis, the Circuit stated that the definition of bank robbery does not include the element of an "intent to steal or purloin" as the bank larceny statute states (*Mosley* Pg. 7). However, "textually", the bank robbery statute contains the dictionary definition of

"steal or purloin". That is, 18 U.S.C. §2113(a) contains the element "takes or attempt [sic] to take – from the person . . . " and the word "steal" is commonly defined "to take the property of another". See *Webster's New Collegiate Dictionary*, G&C Merrian Co. (1974) pg. 1138. The word "purloin" is a synonym of "steal". Id at 937. Therefore, the terms employed in the text of the bank robbery statute and bank larceny statute are alternative means of defining the same element.

Ultimately, because the element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. §2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. §2113(a), (. . . take or attempt to take from the person . . .) it is indeed a textual subset and therefore a lesser included offense within the -"elements" test adopted in *Schmuck v. Unites States*.

❷ Theory of the Case

Every criminal defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury. *Keeble v. United States*, 412 U.S. 205, 208 (1995); *United States v. Burke*, 700 F.2d 70, 81 (2nd Cir. 1983). See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] *any* foundation in the evidence) (emphasis supplied). This is so even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. *United States v. Sielaff*, 655 F.2d 402, 403 (7th

Cir. 1979). See also *United States v. Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984).

Failure to give a requested theory of defense instruction is reversible error when the requested instruction is: 1) correct; 2) was not substantially covered by the court's charge to the jury; and 3) deals with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Benz*, 740 F.2d 903, 910 (11th Cir. 1984).

The evidence in this case, essentially indicating a theft or larceny from the bank warrants the larceny charge. It is a [sic] issue of importance in the defense. Fundamental fairness and the 6th Amendment right to a fair trial compel the instruction.

Respectfully submitted,

/s/ Brian P. Reilly
Brian P. Reilly
Assistant Federal Public Defender

BPR:mp

EXHIBIT 1 to LETTER-BRIEF

BANK LARCENY

Mr. Carter's defense in this case is that his conduct constituted the crime of Bank Larceny in violation of 18

U.S.C. §2113(b) rather than Bank robbery in violation of U.S.C. §2113(a).[1]

I have already charged you as to the four essential elements that the government must prove beyond a reasonable doubt to establish the crime of Bank Robbery. To establish the crime of Bank Larceny, there are also four essential elements that must be proved beyond a reasonable doubt.

The elements of Bank Larceny are:

for Count 1:

First: That the defendant took money that was in the case [sic], possession, control and custody of the Collective Federal Savings Bank, Hamilton, New Jersey; and

Second: That the defendant took the money for his own use and benefit knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The Collective Federal Savings Bank, Hamilton, New Jersey, is insured by

---

[1] Every criminal defendant is entitled to have his theory of the case, if ti [sic] could amount to legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury." *United States v. Burke*, 700 F.2d 70, 81 (2nd Cir. 1983); See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] any foundation in the evidence")

the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count One.[2]

Respectfully submitted,

Brian P. Reilly
Assistant Federal Public Defender

---

[2] Potuto, Saltzburt [sic] & Perlman, *Federal Criminal Jury Instructions*, Second Edition (1993 Supplement).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	No.: CR-97-520 (MLP)
v.	Trenton, New Jersey
FLOYD J. CARTER,	January 20, 1998
Defendant.	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE MARY LITTLE PARELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	U.S. Attorney's Office BY: HENRY KLINGEMAN, ESQUIRE 970 Broad Street Newark, NJ 07102
For the Defendant:	Federal Public Defender's Office By: BRIAN P. REILLY, ESQUIRE 22 S. Clinton Avenue Trenton, NJ 08608
E.S.R. Operator:	Michael Rivera
Transcription Company:	L.B.S., Inc. (80047US.1) P.O. Box 182 Riverton, New Jersey 08077 1-800-678-9558

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

* * *

[26] he does understand.

THE COURT: All right. Well, let's take a moment out of the presence of the jury if that time does arrive. Thank you. Now we'll take up the defense's motions. Mr. Reilly, I have received proposed jury instructions from you. I'm looking them over. Some of them appear to be quite similar to what we generally include in our standard jury instructions, and I'll give you a follow-up on that tomorrow as I will for your proposed instructions, Mr. Klingeman. Now this motion, Mr. Reilly, concerning whether the lesser included offense of bank larceny should be charged to the jury along with the offense of bank robbery, which is in the indictment. I have your letter brief on that and I am familiar with the *Mosely* case and I have reviewed it again since you attached it as a courtesy to your moving papers. Do you wish to argue the motion now?

MR. REILLY: Judge, can we – can we put the evidence in and then will you hear me?

THE COURT: That's fine, if you wish to do it that way. You can't open to the jury with this unless you –

MR. REILLY: I – Your Honor –

THE COURT: You can say –

MR. REILLY: I'm not going to tell the jury to convict him of bank larceny. I am going to tell them that this is not [27] a bank robbery.

THE COURT: You can tell them the government is not going to be able to prove each element of what they

must prove in order to establish the offense of the indictment.

MR. REILLY: And I can tell them that he stole money. That's what this crime is. I mean, I just don't want to get in any trouble with you, Judge. I don't want to step over the line. I will not say –

THE COURT: What is your defense? That he didn't use force, violence or intimidation?

MR. REILLY: That's correct, Judge. And again, if you look in the narrow sense, my defense is the government can't prove the elements of the offense. But the broad defense is they can't prove the elements of the offense, therefore, this is a larceny.

THE COURT: Well, just so long as you don't argue the law to the jury in your opening, I think that there's no error there.

MR. REILLY: And Judge, if after the evidence goes in, you can review my brief or we can discuss it at that time and make the final decision on whether that. I'm certainly not going to stand up and say the Judge is going to tell you that bank larceny is also a part of this case. I would never do that, Judge. But if you hold off on making that decision until after the evidence is, I think it would be appropriate.

[28] THE COURT: Mr. Klingeman?

MR. KLINGEMAN: I'm also familiar with the *Mosely* case. I tried that case, so I know this issue and Mosely did not turn on the facts in the case. It's a legal judgment as to whether bank larceny is a lesser included offense of bank robbery, and the Third Circuit decided

definitively that it is not and thus, under no set of factual circumstances was Mr. Mosely entitled to the instruction and no bank robbery defendant would be entitled to that instruction under the law –

THE COURT: In the Third Circuit.

MR. KLINGEMAN: – in the Third Circuit. And therefore, whether the issue is decided now or after evidence is taken, the decision ought to be the same and that's to deny the instruction.

I do acknowledge and intend to meet the challenge that we must prove the element of the use of force, violence and intimidation, and I suppose the argument to the jury is going to have to be either bank robbery or nothing, and that the issue would be joined, and that's the way it should be.

MR. REILLY: Your Honor, I backed up the argument for a lesser included with a charge to the jury on my theory of the case based on the Sixth Amendment right to a fair trial. If specifically, the charge – if the jury is specifically not going to be given the option to decide on bank larceny, I would ask, Your Honor, as a backup that as a backup on my argument [29] that they should be – have information about it as my theory of the case, that they, at that time, be aware of what the law of larceny is and I think that may be a decision that should wait until after trial.

But I think, Your Honor, after – I have also, as best I could at this point with Your Honor not hearing the evidence, distinguished *Mosely* from this case and I think that you may see, you know, a different, you know, horse

race in front of you and with the disjointed rulings throughout the circuits, I think Your Honor can consider it.

THE COURT: Mr. Reilly, I will state at the outset that I don't see any likelihood that your argument will be able to overcome the very strong holding of the Third Circuit, which is binding upon the courts here, and they went out of their way in that decision to say our decision does not turn on the facts at all.

It's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute, we decline to follow the majority of the circuits in finding the latter to the lesser included offense and we so hold.

I don't know how any possible rendering of the facts at this trial would change that very clear legal ruling by the Third Circuit. So that's a preview of what I think I'm going to be required to rule, but I certainly will hold off making [30] that ultimate ruling until the appropriate time.

I also note that the Sixth Amendment argument was included in the *Mosley* case and was not found to control the decision, that argument having been that the defendant is entitled to instructions on their theory of the defense. They said that was not enough if bank larceny is not a lesser included offense.

So you have an uphill battle here, it seems to me, on the current state of the law in this circuit, which I am sure you recognize. As far as educating the jury on matters not

charged, I would have to be persuaded that that can be done and I don't think that it can be.

Basically, the government it seems to me has framed its case by charging bank robbery, and they either rise or fall on the strength of their proofs on the offense charged. That's how I see it, at least going in.

Is there anything further?

MR. REILLY: Judge, if I may, there's just a matter of the 204B issues which Mr. Klingeman had touched on. There were four or five – four or five incidents that were listed in the motions that we previously heard. Mr. Klingeman has indicated to me that they will not be using any 404B in this case.

However, I just want to place something on the record with my concern with that. Agent Maxwell, who is the case agent and will probably testify, and Terry Stillwell, who is

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	Case No.: CR97-520 (MLP)
v.	Trenton, New Jersey
FLOYD J. CARTER,	January 22, 1998
Defendant.	10:00 a.m.

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE MARY LITTLE PARELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: United States District Attorney
BY: HENRY E. KLINGEMAN, ESQUIRE
970 Broad Street
Newark, New Jersey 07102

For the Defendant:
Federal Public Defender
BY: BRIAN P. REILLY, ESQUIRE
22 South Clinton Avenue
Trenton, New Jersey 08609

E.S.R. Operator: Michael Rivera

Transcription Company: L.B.S., Inc.
P.O. Box 182
Riverton, New Jersey 08077
1-800-678-9558
80047US.1

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[2] (Court Convened 10:00 a.m.)

THE COURT: Are there any issues to raise as we start this morning?

MR. REILLY: I'm not sure, not preliminarily, Judge.

THE COURT: All right. How about Mr. Klingeman?

MR. KLINGEMAN: No, Your Honor.

THE COURT: I would like to have a preview at this time, Mr. Klingeman, as to whether you're going to call any more witnesses because if we bring out the jury and you rest, I'll be entertaining motions right away and it would be kind of a shuffle for the jury to come out, you rest and then have to send them back.

MR. KLINGEMAN: Your Honor, I do intend – I do intend to rest.

THE COURT: Okay. Then, Mr. Reilly, I'm sure you're prepared to argue your motion.

MR. REILLY: Yes, Your Honor, and I'll not be calling witnesses.

THE COURT: Would counsel be willing to make your arguments now on the Rule 29 motion and allow me to rule on it provisionally in anticipation of Mr. Klingeman resting?

MR. REILLY: That's fine, Your Honor.

THE COURT: I think that that's clearer for the jury. Then, depending on my ruling if the case goes forward, then we'll bring out the jury and we'll go forward with whatever you [3] want to do.

MR. REILLY: That's fine, Judge.

THE COURT: All right. So, Mr. Reilly, make your motion.

MR. REILLY: Your Honor, this is a motion for Judgment of Acquittal pursuant to Rule 29. Understanding the standards that are in effect, that the evidence is viewed in a light most favorable to the Government.

Again, Judge, as is clear in this case, the crux of the issue is whether force, violence or intimidation were used or occurred in this case. And I submit that the evidence does not show, and the Government has not met it's burden, and the jury – there is not enough evidence in this case for a reasonable juror to even infer that force, violence or intimidation occurred.

The focus, of course, Judge, according to the law and according to the jury instruction that you prepared that states the law, is that it is Mr. Carter's conduct that is at issue here. It is not the subjective feelings of the witnesses that we heard so much of during this case.

The fact is, Judge, his conduct being the issue, we have to look at all the conduct. We have first Mr. – the evidence showing that Mr. Carter entered the bank, screams no threats. He's unarmed. He permits customers to leave. He doesn't round anybody up. A decision made peaceable and [4] non-threatening.

Of course, he bumps into Mrs. Zahn, but she's free to leave and she knows that he has no interest in her. He makes no demands on her. He doesn't insist that she stay in the bank, and in fact, she's free to go. And it's clear in this case that Mr. Carter just wants to get the money and get out. And in fact, through Agent Maxwell, he admitted as much by simply saying the specific words, "I wanted to snatch a money bag". I went in and I took the money and that's what I did.

When he goes to the counter, Judge, I know that, you know, there's been some discrepancies about the charts. But what is clear from all that is that Mrs. Chudney's – Ms. Kudney's office comes out to a certain level, and the teller station that he crossed is certainly further over to the right than the Government's chart indicates.

Now in going into the bank, he had the opportunity to go, I mean, you want to accomplish this offense quickly – to go straight ahead, to either Senteck (sic) or Kalikal (sic). But there's people there, all right? And he specifically made the decision to go away from where the people are. And I think that's an indication that's completely contrary to any force, violence or intimidation.

He specifically takes the time to say to the tellers, don't worry, I'm not going to hurt you. Okay. Now what kind of conduct is that? That's conduct clearly indicating no [5] threats, no force, no violence, no intimidation. And I think that, Judge, it's completely contrary to the concept of the elements of force, violence or intimidation.

Once he grabs the money, he runs out and he simply says, don't follow. Okay. Now I think based on all those facts, Judge, based on what his conduct is and what was

presented here in this Court, no reasonable fact finder could find threat, force or intimidation. And I ask that Your Honor enter a Judgment of Acquittal.

THE COURT: Thank you, Mr. Reilly. What is the Government's response?

MR. KLINGEMAN: Your Honor, the United States opposes the motion. There are four elements to the offense charged in the indictment and the United States has provided evidence that when viewed in a light a most favorable to the Government establishes that the defendant committed the offense charged.

The first element is that the defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank, Hamilton Township, New Jersey. Through the testimony of Ms. Kalikal, Ms. Kudney and Mr. Phipps, who conducted an audit, it's clear that the defendant did take money. And based on the posture that the defense has taken in this case, that fact is undisputed.

The second element is that the money was in the care, custody, control, management or possession of the Collective [6] Savings Bank at the time it was. taken. The testimony elicited establishes that not only was the money taken from teller drawers where it had been secured, but that the audit conducted by Mr. Phipps revealed that the money was, in fact, the bank's money and not the personal property of any of the employees.

Third, the defendant took the money by means of force, violence or intimidation. Let me set that aside for a moment.

And fourth, at the time the money was taken from the Collective Savings Bank, the deposits of the bank were insured by the Federal Deposit Insurance Corporation. We elicited testimony from Mr. Phipps and included as Government Exhibit 111 which has been admitted, the FDIC certificate indicating that at the time of the bank robbery, the bank was so insured.

With respect to the first, second and fourth elements, there's apparently no dispute.

In any event, getting back to the third element, whether the defendant took the money by means of force, violence or intimidation, the use of force and violence is defined as including the use of physical strength or physical violence. Obviously, Mr. Carter's physical conduct when he was in the bank manifested both of those prongs of the definition.

He shoved Ms. Zahn out of the way. There's no question that that was not an accident. In fact, there's no evidence that it was an accident other than Mr. Reilly's [7] representation in opening statement.

He leaped over the counter, not once, but twice. And I think under the circumstances, his use of that technique to reach the tellers' areas is itself a manifestation of physical strength equaling force. And with respect to intimidation, the panoply of actions in which he engaged amount to intimidation.

First of all, the use of the ski mask which has been admitted as Government Exhibit 112, ought to be enough in and of itself to establish this element. Any reasonable person associates a ski mask being worn in a location

other than a ski slope as a mask of terror. And that is the purpose for which is was used in this case. Secondarily, of course, the defendant may have been attempting to disguise his identity, but certainly the use of the ski mask, whether he had the specific intent or not, amounts to an intimidation technique.

You add to that the statement he made to Mrs. Zahn, hold on, move over, as he shoved her aside; the way he jumped over the counter and took the money from the presence of the tellers; the way be jumped back over and fled; the fact that he said to the tellers and the other people assembled in the bank, "don't follow me", which is clearly a threat. It's not – he was not playing a game. He was not suggesting that he was playing hide and seek and he didn't anybody to see where he was going to go hide. It was clearly an implied threat that if anyone followed him, consequences would follow. [8] Not only do we survive or meet the Rule 29 standard, but this evidence will establish his guilt beyond a reasonable doubt and so, therefore, I would respectfully request that the motion be denied and we submit this case to the jury.

THE COURT: Mr. Reilly, do you have anything in response?

MR. REILLY: Your Honor, I just want to make one comment, and indicating in response to the Government's argument that the mask in itself is intimidation. The law is that intimidation involves conduct that is reasonably calculated to instill fear of bodily harm. I don't think that that intimidation occurred in this case, and there's no evidence in this case that that intimidation

occurred. And I submit that the motion should be granted.

THE COURT: There's no dispute about the standard for the Court's evaluating a Rule 29 motion is that the evidence must be viewed in a light most favorable to the Government who is the non-moving party. And that the question is whether a reasonable jury could find in favor of the Government on the charge presented beyond a reasonable doubt.

The arguments of counsel have accurately reviewed what are basically uncontroverted facts. But I will review the evidence as well.

There is ample evidence in this even brief trial establ charge. It has been established by the evidence that the [9] defendant knowingly and willfully took money from or in the presence of employees of the Collective Savings Bank on the date in question. That's the first element.

The second element, likewise, has been satisfied. It has been established through the testimony of the bank manager, Mr. Phipps, as well as the corroborating testimony of an officer of Hamilton Township that the money that Mr. Carter was found with was, in fact, the money which had been taken from the management and possession of the bank. There was bait money involved and the serial numbers of the bait money were maintained by the bank and found on at least 50 of the – exactly 50 of the bills that were in Mr. Carter's possession when he was apprehended directly after the incident at the bank.

And, of course, through the bank manager, the Government has established that the bank and its deposits were insured by the FDIC at the time of the incident.

And so, the issue here will boil down to whether the evidence presented, a reasonable jury could find beyond a reasonable doubt that Mr. Carter took this money by means of force, violence or intimidation. And here again, the facts are relatively – the essential facts are uncontroverted but they have been established through the evidence.

The first witness was Maria Zähn, who was a customer at the time of the incident. She testified that on the date in [10] question which was September 9, 1997, it was a nice day. The weather was fairly warm. She had completed her business at the teller window at approximately 2:00 and was exiting the bank in order to pick up her children from school.

As she approached the exit door of the bank, she was confronted face-to-face by a person entering that door from the right who was wearing a knitted ski mask and heavy winter clothing. He opened the door and she immediately wanted to run out. He grabbed her physically with both hands and pushed her inside, saying, hold on. In other words, restraining her exit from the bank and then moved her or turned her in such a way as to spin her out of his way as he rapidly entered the bank. And with that, he said move over.

She also testified here that she screamed upon having that encounter. He rapidly moved on past her. She watched him as he moved in the direction of the tellers. After that her part in this scenario was over.

The next witness to testify was a customer service rep named Marjorie Kudney, and she was sitting at a customer service desk directly inside the door in question and she had a cubicle of sorts which gave her complete vision of the lobby area of the bank and the teller windows. And so she was an observer of these events rather than a direct participant.

She said that she first noticed anything irregular when she heard a scream. She looked up and saw a lady, a [11] customer exiting through that door and then she immediately looked to her right and saw a man jumping over the counter into the teller stations. She described the man, also, as wearing a mask and dark clothes. Then she said that this man walked behind the teller area and appeared to be taking money from the teller stations. She was also seated at her desk throughout this brief episode. And as the man left, she said that she heard the man say, don't follow me. And she indicated that she was feeling nervous and a little frightened having witnessed this.

The cross examination brought out that she had – Ms. Kudney had indicated to the police that at no time was she in fear for her life and that she saw no weapon and heard no threats except the last statement which was not to follow him. She heard no demands being made by him. She did interpret the last statement as sort of a threat and also she stated on re-redirect that although she was not in fear of her life, she was in fear at that sequence of events.

The next witness to testify was Mildred Kalikal; she was one of the tellers. She was there at the teller station at approximately 2:00, assisting a male customer, and all of a sudden she saw the man described jumping over the

counter at Ms. Hairsten's station which was two down from her. She testified that Ms. Senteck's station was the one immediately to her left and that after the man had jumped over at Ms. [12] Hairsten's station, Ms. Hairsten had run from her teller station to the branch manager's office and that the man had gone to Senteck's station, opening the drawers of Senteck's teller equipment station and – both top and bottom drawers, he opened – and he took the money out of those drawers and put it in a brown grocery bag.

Ms. Kalikal testified that while this was occurring at Ms. Senteck's station, Ms. Senteck was at her station crying and trembling. Ms. Kalikal also said that as this was transpiring, the man in the mask said to all of them – at this point it would be two of them – that he wouldn't hurt anybody.

Ms. Kalikal also testified, over the objection of defendant, that as she witnessed this sequence of events and as he then came to her drawer, standing about two feet from her, she felt scared. She was afraid that there might be a weapon. And although the man said that he wouldn't hurt anyone, she was still afraid. She had never encountered anything like that in all her life. She was really scared; did not know what to do and she stood motionless while the man proceeded to open her top drawer, moving quickly, and removing money from that drawer and putting it in his bag.

She also witnessed him leaving saying that no one should follow; and she perceived this as a threat, such that if anyone did follow, he might hurt them.

She did confirm that she was not verbally threatened [13] and that no demands were made to her.

The branch manager Mr. Phipps testified he had his own office, which gave him full view of the lobby because he had an interior glass window and his door was opened at the time. He was sitting at his desk when he heard a loud bang, and then a blur, via monitor, running across the lobby, which he perceived as a man. As the man reached Ms. Hairsten's station, he saw the man leap into Ms. Hairsten's station by jumping in one leap – he hurtled the counter in one leap.

Mr. Phipps was not quite sure how this man negotiated the ropes and stanchions, which indicated the line for the customers, but he did confirm that the man ran toward the teller counter and that he jumped over at the location of Ms. Hairsten's counter, whereupon Ms. Hairsten ran into Mr. Phipps, office saying he's after me, and also saying my purse is still there.

At that point Mr. Phipps replied to her that in Mr. Phipps' observation the man was not after Ms. Hairsten, he was after the bank's money and not after her purse. He was after the banks' money.

At that point Mr. Phipps pressed the alarm while he witnessed the man going to the several teller drawers, taking the money and then exiting by leaping over the same counter from which he had entered and going out of the bank.

He said he was upset and scared while all this [14] occurred and that when the man left he described that the tellers were frozen and that while he had taken the

money, according to his testimony, he perceived that those particular tellers were scared to death and that they stood there without looking at the man.

He confirmed also that no weapons were used in this incident and that he heard no demands while the man was taking the money. He also confirmed – I'm not sure whether he corroborated the testimony of the others, which is undisputed – that as the man left he said don't follow.

Mr. Phipps provided additional testimony to the effect of what he did in order the manage the bank once the man left. Namely, he had the interior lock thrown so that everyone within the bank was secure and then he started the investigational procedures, including with the customer who had been standing at Ms. Kalikal's station at the time.

The testimony of Officer Inman (sic) had to do with the apprehension and putting in the various physical items of evidence so they do not go to the events within the bank, except that they do confirm what the defendant was wearing; namely, that when he was apprehended he had in his possession a black ski mask and that he was wearing not only heavy clothing, but several layers of clothing, including at least two layers of pants as possible outer-wear.

Special Agent, F.B.I. Agent James Maxwell testified [15] that he interviewed the defendant immediately after the arrest and after providing him with his rights and having him also read a waiver statement, which was signed and witnessed at 3:05 p.m., less than an hour after the incident.

Among other things, as reported by Agent Maxwell, the defendant did admit taking the money; he did admit entering the bank for that purpose, but said that he went to the bank to snatch the money and that he went into the bank so that he could take the money.

I have reviewed again the *Mosley* case, this time from the standpoint of what sorts of facts could support a conviction on what is called bank robbery, which is found at 18 *U.S.C.* Section 2113(a). The indictment in this case does charge that offense.

It does not charge the offense set forth at 18 *U.S.C.* Section 2113(b), which is known as bank larceny, and earlier we were discussing defendant's motion that this case should be regarded as, at least, potentially including the bank larceny charge as a lesser included offense. We will get to that again, of course, as we deal with the jury charge, but the *Mosley* case does set forth the facts of the two robberies which were involved in *Mosley* which resulted in convictions on the bank robbery charge. It also discussed the difference between bank robbery and bank larceny as envisioned by Congress in passing these in two separate provisions.

[16] In the *Mosley* incident there was a confrontation of tellers at the a First Fidelity Bank on November 20, 1995; and a different First Fidelity Bank on November 9, 1995, which were charged in that case.

In the first count offense the individual had approached the teller window, leaned toward her and said this is a hold up and instructed her to open the drawer and give him the money and the teller did so,

while he was telling her to hurry, hurry, and get the big bills first.

At that case there was a gesturing by the defendant as if he had something there, but there was no weapon actually used or brandished or mentioned.

In the second incident the same man entered the different bank on a different date with a sign reading "hold up" and approached the teller station. The teller testified that Mosley placed both of his hands on the counter and said can I have all your money, with the perpetrator using a defensive, but demanding, tone of voice. She gave him first bait money, which he threw back at her and then she gave him the other money and the defendant walked out at a fast pace and the teller walked away at that point, in that circumstance.

So those were confrontations. They did involve demands, which this case did not. They did not involve weapons, and neither did this case.

In the discussion of the Third Circuit Court of [17] Appeals in the *Mosley* decision in which they did find, of course, that as a matter of law in this Circuit it is their view that the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense; and, of course, the *Mosley* case did recognize that in reaching that conclusion they find themselves in the minority of circuits, at least at this time.

They explained by reference to earlier cases, both in another circuit and in our United States Supreme Court,

the legislative history of the bank larceny statute, Section 2113(b); and in brief reference, I am reviewing it because I think it sheds some light on what is the distinction between bank larceny and bank robbery.

They said that Congress initially passed the bank robbery legislation, now found as Section 2113(a), in 1934 and declined at that time to pass a bank larceny provision which had been proposed. They added the larceny provision three years later, according to the *Mosley* decision, in reaction to a case in which a man walked into a bank and without confronting any bank employees helped himself to $11,000.

Thus, said *Mosley*, the larceny statute seems designed to address a different factual scenario than the typical bank robbery case.

I have followed up by looking at the Supreme Court [18] case which sets forth this history of the bank larceny statute, and that is found in *Bell v. United States*, 462, U.S. 356. The *Mosley* case particularly refers to Section 365, Note 4 of that decision, which is found in Justice Steven's opinion dissenting; however, the history of the statute is found in that dissenting opinion and the facts in the case referred to – I will read that footnote, which is a quote from the *Congressional Record* (1937). The *Congressional Record* says;

> " The fact that the statute [as of 1937 that was] is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago when a man was arrested in a national bank while walking out of the building with $11,000

of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees without displaying any force or violence and without putting anyone in fear, which are necessary elements of the crime of robbery, and was about the leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute . . . "

So it is conceivable, it seems to me, that a person could commit bank larceny while walking into a bank and not have that taking rise to the level of bank robbery, even if it [19] is not a taking by trickery such as cheating a bank teller out of money by presenting a bad check or something.

However, the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case that, objectively speaking, the behavior of Mr. Carter was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense.

For those reasons, and with due regard to the able and I think very effective presentation by counsel for the defendant, I deny the motion which has been brought under Rule 29.

At this point we do anticipate that the Government will rest and, Mr. Reilly, you have your opportunity to present any case that you wish on behalf of your defendant after that.

MR. REILLY: Okay. Judge, did you want to do the jury charges now or will we do it –

THE COURT: Well that's what I'm thinking. Again, because we'll bring the jury out and if both sides are going to rest then they will leave.

MR. REILLY: If I could just have a minute on that last issue, Judge.

[20] THE COURT: Certainly. You can have all the time you want.

MR. REILLY: A very brief minute. (Pause)

MR. REILLY: Your Honor, Mr. Carter will be taking the stand and I just want to clarify one issue, and we did this pretrial and I just want to make sure everybody is on the same page.

Mr. Klingeman has agreed that the only prior conviction for cross examination is a January 7, 1990 – I'm sorry, May 10, 1996 conviction for theft by unlawful taking out of Mercer County Superior Court.

Again, if the door is open, I guess that's another problem because there are some other convictions; however, what I want to avoid, Judge, is any circumstance – and I have no reason to believe that Mr. Klingeman will do it, but I just want to make sure that if there is any question – or that there should not be any questioning as to the issue of what happened, you know, for an explanation of what happened, the circumstances surrounding that conviction, necessitating an objection on my part in front of the jury and I would just like to avoid that.

THE COURT: Mr. Klingeman, can you indicate your intention with respect to the use of the prior conviction?

MR. KLINGEMAN: I don't intend to get into the

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted In Printing]

* * *

[71] defense will insert.

MR. REILLY: If you want to write it in now.

THE COURT: Okay. Do it over there and then give it to Kelly and we'll make copies. And as soon as you're ready, let's do this conference then before we recess for lunch.

MR. REILLY: Judge –

THE COURT: Do you want five minutes?

MR. REILLY: Since this goes in, can I – should I have somebody from – I mean I'm happy to do it – somebody from my office pick this up and type it up real quick?

THE COURT: No, we can do that.

MR. KLINGEMAN: That's fine.

THE COURT: Uh-huh. All right, well we will –

MR. REILLY: Oh, Kelly, I'm sorry.

THE COURT: – we won't even type this. We'll just xerox it now. We'll do the conference and then I will make any changes that are agreed to by the Court and provide you with a final draft of the charge. You can take that along with you. It won't take us but a few minutes to rerun it.

MR. REILLY: Thanks, Your Honor.

THE COURT: So if you'll just stand by, we'll have the conference on the record here in open Court.

(Off the record)

THE COURT: Okay. We'll conduct the jury charge conference at this time.

[72] MR. KLINGEMAN: Yes.

THE COURT: Mr. Reilly, you're on your feet. You may go.

MR. REILLY: Your Honor, I had submitted and I asked Your Honor to charge the theory of the case, a theory of the case charge to the jury in light of the fact – and I don't think your opinion has changed – that I'm not going to get a lesser included charge for the jury to consider. Therefore, I would request that the theory of the case which is just a one paragraph document that the government has reviewed and, in fact, the government has made an addition to that I don't object to, I ask that that be charged.

Other than that, Judge, the only thing that I have, the only comment that I have on your charge in draft one is on page 13, the second to last paragraph from the bottom. The paragraph begins, a person acts willfully. I would request, Your Honor, that an additional sentence be added to that indicating that conduct is not willful if it was done due to negligence, inadvertence or mistake.

THE COURT: Mr. Klingeman.

MR. KLINGEMAN: I have no problem with that.

THE COURT: Okay. I'm not familiar with that sentence being there, but if there's no objection, I think

that that is certainly an accurate statement of the concept. Read it to me again.

[73] MR. REILLY: One second, Your Honor. The paragraph – read the sentence?

THE COURT: I know where it is. I know where it is. Conduct is not willful –

MR. REILLY: Is not willful if it was done due to negligence, inadvertence or mistake.

THE COURT: Okay.

MR. REILLY: That's my only comment with respect to the charge, Your Honor.

MR. KLINGEMAN: Your Honor, beginning on page 10, the first headlined instruction, Impeachment by Prior Conviction is applicable.

THE COURT: Right. And I'll take out the heading and just leave in the text.

MR. KLINGEMAN: Okay. The second headlined instruction on that page, Cooperating Witness, is inapplicable.

THE COURT: Right.

MR. KLINGEMAN: On page 11, the first highlighted instruction, Defendant's Testimony, is applicable and the second one is inapplicable.

THE COURT: All right.

MR. KLINGEMAN: On page 14 –

THE COURT: And I'll take out the heading.

MR. KLINGEMAN: On page 14, the last full paragraph, and on page 15, the first full paragraph, are both inapplicable [74] to this case, and I'd ask that they be deleted as well.

THE COURT: The thing about good motive is not a defense?

MR. KLINGEMAN: Well the first paragraph actually begins, personal advancement and financial gain are two well recognized motives.

THE COURT: Right.

MR. KLINGEMAN: And the second paragraph begins, good motive alone. Obviously, in light of the evidence, neither of them apply.

THE COURT: I would suggest if we're going to agree to delete that, that we should leave out the prior paragraph as well. This is a three paragraph section which is sometimes used, but is sometimes not used. I have a sense that it sometimes confuses a jury more than it instructs them in the law.

MR. KLINGEMAN: That will be fine with me.

MR. REILLY: That's fine, Judge. Motive isn't an issue and I think intent is what we're going to be talking about all day.

THE COURT: Okay. Good suggestion, thank you. Actually, I only put it in because you included it in your extensive options, Mr. Klingeman.

MR. KLINGEMAN: Right. On page –

THE COURT: Alibi is out.

[75] MR. KLINGEMAN: Right. But just at the beginning of that page, the first sentence, the first full sentence reads: "The focus is on the conduct of the accused and not on the reaction of the tellers".

MR. REILLY: What page are we on?

MR. KLINGEMAN: This is page 16, top. That paragraph was added at the behest of the defendant, and in general I didn't object to it, and I don't object to it. But I do object to the language at the end of that first sentence – and not on the reaction of the tellers. The law is clear that the reaction of the tellers is relevant. To the extent that the reaction of the tellers is established by evidence in the case, an unreasonable reaction or a reaction of a particularly timid person, the reaction of the tellers may be – it may not advance the government's case, and I don't know – the government argues it does. And that legal explanation I just gave is given in the previous, or at the top of that paragraph that includes this sentence. And I don't want the jury to get the misimpression that they're to disregard the tellers' testimony.

I know counsel has made a number of objections to that testimony, but Your Honor has not sustained those objections, in view of the plain relevance of the evidence. And therefore, I'd ask that that sentence simply read, the focus is on the conduct of the accused – period. I have no [76] problem with that. But I don't want there to be any misimpression that but the focus should not also be on the reaction of the tellers.

MR. REILLY: Your Honor, that sentence was taken from case law and it originally read, "the focus is on the conduct of the accused and not on the reaction of

the victims". I simply included the word tellers because those were the people that witnessed the event. And in fact, they are not necessarily the victims of the robbery in the sense that the bank was the victim of the robbery.

But I think the case law is clear that the focus is on the conduct of the defendant. And I am at the opposite spectrum, of course, from Mr. Klingeman in that I don't want them to think that because the tellers are scared, that's intimidation. In fact, the case law is that simply having a scared teller is inconclusive as to whether intimidation occurred. So I think that the language should remain as it is.

MR. KLINGEMAN: Well, Your Honor, I propose as an alternative a brief sentence in between that sentence beginning, the focus is on, and the next sentence, the conduct must be reasonably calculated, that says that the reaction of the tellers, however, is relevant – period.

THE COURT: I think that there is a potential for confusing the jury leaving the sentence the way it is. It does not confuse a Court of Law, but it could confuse a jury. They [77] could say to themselves, well we've heard all of this about the tellers. If the reaction of the tellers is not the focus, then why did we hear it. So I think that Mr. Klingeman's suggest is a good one and it does preserve the defendant's opportunity to argue to the jury that the test is the objective reasonable person test. So –

MR. REILLY: Well, Your Honor, rather than – I'm not sure what your remedy is going to be. Perhaps I should hear that first. But I would suggest if you're going

to change that, then do as Mr. Klingeman said initially, simply put a period after the word accused.

THE COURT: Okay. So you would rather – given these two unattractive alternatives, you'd rather just cut the sentence at the word accused and not add the additional sentence Mr. Klingeman proposes.

MR. REILLY: Yes, Your Honor. Yes.

THE COURT: Okay. I'm going to do that then. And you still have preserved, Mr. Reilly, your suggestion that this, that these additional six words – eight words be in there, but I'm deleting them. But what I shall do is make sure that it does not appear as a new paragraph. In other words, it will be the paragraph beginning it is not necessary, on the prior page, contain and string along to these last two sentences with those eight words deleted.

MR. REILLY: Thank you.

[78] THE COURT: Uh-huh, thank you. And shall we continue, Mr. Klingeman?

MR. KLINGEMAN: Yeah.

THE COURT: Oh, while we're there, we're in the section of by force and violence or by intimidation defined, beginning at page 15. I think the appropriate place to put defendant's theory of the case language is right in there.

MR. REILLY: I think you're right, Judge.

THE COURT: So it would be without a heading, but it would come immediately after we say, the conduct must be reasonably calculated to produce fear of bodily harm. Okay? Your response has to be oral.

MR. REILLY: Oh, yes, Your Honor. That's fine.

MR. KLINGEMAN: Yes.

THE COURT: Thank you. Mr. Klingeman, you have the floor.

MR. KLINGEMAN: Your Honor, continuing on page 16, as you indicated a few moments ago, alibi should come out, and evidence of flight or concealment is applicable.

And finally, on page 18, Your Honor included an aiding and abetting instruction and –

THE COURT: I threw that in just to remind us to discuss it.

MR. KLINGEMAN: Yeah. It's our position that the defendant was the principal here and not the aider and abettor. [79] My only concern in terms of this instruction is the possibility for confusion.

THE COURT: I will not give it unless you plan to argue it.

MR. KLINGEMAN: I don't plan to argue it.

THE COURT: Well we'll take it out. Since it's in the indictment, you have to have the option.

MR. KLINGEMAN: Right. That's all I have, thank you.

MR. REILLY: I have nothing further, Your Honor.

THE COURT: Fine. Well we will revise this accordingly and provide you with a draft on the table

which you can pick up. I do suggest that you look it over, but I will have these changes made.

MR. KLINGEMAN: Your Honor, just by way of information, is it your practice to charge before or after summations?

THE COURT: I've done it both ways. Customarily, I charge them last.

MR. KLINGEMAN: Would you entertain an application to do it in reverse order today?

THE COURT: Mr. Reilly?

MR. REILLY: Your Honor, I would prefer that the charge be thelast thing that the jury hears before going into the jury room to deliberate. I think that's the appropriate procedure.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted In Printing]

* * *

Jury Charge

[117] your own selves, was he joking? "Don't follow me. I'm a fast runner." Or was he saying don't follow me or else? The answer to that question dictates the only verdict that you can render.

THE COURT: All right. Members of the jury, we have been here for an hour an a quarter. The jury charge itself will be read to you.It takes maybe 15 minutes. Unless anybody wants a recess, I would propose to provide that to you now and then you can begin your deliberations. Anyone that wants a recess, raise your hand. Okay, we will take a recess. It's very important that you be silent during this recess for obvious reasons. Ten minutes and then we'll resume.

(Jury exits Courtroom)

(Court in Recess – Court in Session)

THE CLERK: All rise.

(Jury enters Courtroom)

THE COURT: This is already written up on paper because the lawyers had an opportunity to have input as we prepared the legal instructions and then you have the opportunity to take it with you to the jury room to refer to it if you need to. That way you won't have to be scribbling any notes on the legal concepts as you're listening to them. It is also required to be presented to

you orally in Court. So if you'll just sit back a listen, please.

Members of the jury, this criminal case during which [118] you have seen and heard all of the evidence and heard the closing arguments of counsel now approaches its final phase when you will be called upon to enter on your deliberations and render a verdict in the case. Before you retire however, it is my duty to instruct you on certain principles of law which you must follow in performing your obligations as jurors.

Before doing so, the Court wishes to express its sincere appreciation to you for the services that you are rendering as jurors in performing your most – one of your most important duties as citizens.

Now as you know, the Government has accused the defendant, Floyd J. Carter, of committing a certain crime. But this is only a charge. In order for you to find the defendant guilty, you must be convinced beyond a reasonable doubt that the defendant committed a crime as charged. If you are not convinced beyond a reasonable doubt that the defendant committed the crime as charged, you must find the defendant not guilty of the crime.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court, and you'll apply that law to the facts as you find them from the evidence before you. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon a view of the law other than that given in the [119] instructions of the Court.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You should construe each of the instructions in light of and in harmony with the other instructions. And you should apply the instructions as a whole to the evidence. The order in which these instructions are given has no significance and is no indication of their relative importance.

As the jury in this case, as you know, you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. And you draw whatever reasonable inferences you decide to draw from the evidence as you – from the facts as you have determined them.

I will discuss with you in a moment how to evaluate the credibility or believability of the witnesses. Now your deliberations, as you know, should be based only upon the evidence. Evidence consists of the testimony of witnesses, exhibits received into evidence, and any facts stipulated during the trial. I don't believe we have any facts stipulated.

MR. KLINGEMAN: No, Your Honor.

MR. REILLY: No, Your Honor.

THE COURT: You, of course, may make deductions and [120] reach conclusions which reason and common sense lead you to make. In other words, you are committed to draw from facts that you find have been proven such reasonable inferences as seem justified in light of your experience. An inference may be defined as a deduction or a conclusion which reason and common

sense lead you to draw from facts which have been established by the evidence. Such as, for example, I mentioned the example before, deducing that it's snowing outside when you see evidence of that directly when you're in the building.

Evidence does include both direct and circumstantial evidence. An example of direct evidence is the testimony of a person who asserts actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof when a chain of facts and circumstances tend to prove or disprove a conclusion. However, the law does not distinguish between the relative worth of direct and circumstantial evidence. One type is not of more or of less value than the other. And that's the law.

Statements and arguments of counsel are not evidence in the case. Questions asked by the lawyers are not evidence, for the evidence consists of the witnesses answers to the questions, not the questions themselves. When, however, the attorneys – again, I mention stipulations here but there just haven't been any in this case. You needn't concern yourself with that.

Any question as to which an objection was sustained [121] by the Court, that is a question that I ruled out, and any evidence which was ordered stricken by the Court – I believe I ordered you to disregard a portion of a sentence – must be entirely disregarded. You should not consider the Court's ruling on evidence as indicating anything about the strength or correctness of the position of either side in the trial as a whole. Anything you may have seen or heard outside the Courtroom is not evidence. However, you do have a right to consider all of the evidence in light of your own general knowledge in the affairs of life.

There has been testimony at trial that one or both of the attorneys or their agents interviewed witnesses to prepare for trial. No adverse or negative inference should be drawn from that conduct. Indeed, the attorneys were obligated to prepare this case as thoroughly as possible and that may generally include interviewing witnesses who the attorneys intend to call or who may testify at trial.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to what – as to the facts or as to what your verdict should be. The legal rulings that I have made during the trial are not any indication of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

You may not draw any inference – I mentioned this in [122] the opening statement – you may not draw any inference favorable or unfavorable towards the United States or the defendant on trial from the fact that any persons were not named as defendants in the indictment before you. The circumstances that any other persons were not indicted or were not on trial here must play no part in your deliberations. It should be of no concern to you, and you should not speculate as to the reason for their absence. Their absence should not influence your verdict with respect to the defendant on trial at this time. You must base your verdict as to the defendant solely on the evidence against him.

You will need to rely on your memory to recall witness' testimony. You will not be given transcripts of the testimony. However, if you truly cannot recall certain

testimony necessary for you decision, you may ask to hear that testimony again. Of course, documentary exhibits and other things in evidence will be available the you in the jury room.

As you know, you were permitted to take notes in this case, and some of you did so. Such notes should only be used as aids to your memory. And if your memory should later differ from your notes, of course, it is your memory which should control.

If you did not take notes, you should rely upon your own independent recollection and memory of what the testimony was and you should not be unduly influenced by the notes of [123] other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony was.

Now this case will be submitted to you for your verdict in the form of a written verdict sheet. It is necessary that you understand certain legal terms and rules which play a large part in the determination of this case. So you will now be given some definitions and explanations.

Before commencing your deliberations, you are reminded that under the law a person is presumed innocent of the crime charged. As I stated earlier the defendant in this case has been charged by indictment with the commission of a certain violation of law. The fact that he has been indicted is no inference of guilt. An indictment is simply a formal method of accusing a person of a crime. It is not and cannot be considered as evidence in any degree or in any way against the defendant.

Under our law, a defendant is presumed innocent. Thus, a defendant, although accused, begins a trial with a clean slate and nothing but the evidence presented before the jury may be considered as more than a charge against the accused. I instruct you that the presumption of innocence alone is sufficient to acquit the defendant, unless you the jury are satisfied beyond a reasonable doubt of the guilt of the defendant after careful and impartial consideration of all [124] of the evidence in the case.

The defendant has pleaded not guilty to the charge contained in the indictment. His plea of not guilty puts in issue each of the essential elements of the offense described in these instructions and it imposes upon the Government the burden of establishing each of those elements by proof beyond a reasonable doubt.

The burden of proving each and every essential element of the offense is at all times upon the Government.

This burden never shifts. It remains upon the Government throughout the trial and even as you deliberate. Thus, unless the Government has proven beyond a reasonable doubt each of the elements of a crime against the defendant as charged, the defendant must be acquitted of that crime.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. And reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proven by convincing character that a reasonable person would not hesitate to rely upon it in the most important of their own affairs.

A reasonable doubt may rise not only from the evidence before you, but from a lack of evidence. Reasonable doubt is one that appeals to your reason or your judgment, you [125] common sense and your experience. Reasonable doubt is not a vague, hypothetical or imagined doubt. The principle should not be used as an excuse for avoiding the performance of an unpleasant duty.

Please remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. It is not necessary for the Government to prove the guilt of the defendant to a mathematical certainty or beyond all doubt. In this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to mathematical computation.

If you, the jury, after a careful and impartial consideration of all of the evidence in the case have a reasonable doubt that the defendant is guilty of the charge, you must find the defendant not guilty. If, however, you are convinced that the defendant has been proven guilty beyond a reasonable doubt, you should find the defendant guilty.

As previously stated, the defendant is presumed to be innocent and the burden on proving each and every essential element of the criminal offense charged is at all times upon the Government.

A defendant has no burden to prove that the defendant is not guilty or to present any evidence or to testify. The [126] defendant is not even obligated to cross examine witnesses for the Government.

You are here to determine whether the Government has proven the guilt of the defendant for the charge in the indictment beyond a reasonable doubt. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons.

Now on the subject of credibility of witnesses. You a as jurors are the sole and exclusive judges of the credibility of the witnesses called to testify in this case, and only you determine the importance or the weight that their testimony deserves. After making your assessment concerning credibility of a witness, you may decide to believe all of it, all of that witness' testimony, only a portion of it, or none of it.

In making your assessment you should carefully consider, carefully scrutinize all of the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness' intelligence, motive to falsify, state of mind and appearance and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider, also, any relation the witness may bear to either [127] side of the case, the manner in which each witness might be effected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses

may or may not cause your to disagree or miscredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it different. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail, and consider whether the discrepancy results from innocent error or intentional falsehood.

The testimony of a law enforcement officer is entitled to no special or exclusive credibility. An officer who takes the witness stand subjects their testimony to the same examination and the same test of credibility that any other witness does.

The testimony of a witness may be discredited or impeached by evidence showing that the witness has been convicted of a felony, a crime for which a person may receive a prison sentence of more than one year. Prior conviction of a crime that is a felony is one of the circumstances which you may consider in determining the credibility of that witness.

[128] It is the sole and exclusive right of the jury to determine weight to be given to any prior conviction as impeachment and the weight to be given to the testimony of any one who has previously been convicted of a felony.

During the trial, Defendant Floyd J. Carter did testify. A defendant who wishes to testify is a competent witness and his testimony should not be disbelieved merely because he is a defendant. However, in weighing his testimony the jury should consider the fact that defendant has a vital interest in the outcome of his trial, an

interest that is possessed by no other witness, and is therefore, a matter that may seriously affect the weight and credibility to be given his testimony and one that you should seriously consider.

Now you will have a copy of the indictment in the jury room as you deliberate. But I again instruct you that the indictment is not part of the evidence in this case. The indictment is an accusation and you may not draw any inference of guilt on an accusation. Indictment is merely the formal way in which the United States brings this case to trial. Also, the fact that this prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that afforded to any other party to any litigation. All parties, whether the Government or individuals, stands as equals in the Court of Justice.

I have previously read you the indictment and you [129] will have it with you in the jury room. So I will not repeat the reading of the indictment now. But I will discuss the indictment.

Title 18 *United States Code,* Section 2113 (a) which is the offense charged in the indictment that I read to you earlier, provides in pertinent part:

> "Whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any I federally insured bank shall be guilty of a crime against the United States."

You will see that there are some graphics in reading this quote. The words federally insured and the last few

to establish that the defendant knew that he was breaking any particular law. Ignorance of the law is no excuse and is not a defense in this case.

Knowledge may be proven by a defendant's conduct and by all the facts and circumstances surrounding the case. Knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, the [131] only way you have to arrive at a decision on these questions is for you to consider all of the facts and circumstances shown by the evidence and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is not necessary. Knowledge and intent may be inferred from all of the surrounding circumstances. You may consider the defendant's words or actions as well as other facts and circumstances in evidence and the reasonable inferences from that evidence to determine the defendant's state of mind and intent.

Now the phrase by force and violence or by intimidation used in the statue means either first, the use of actual physical strength or actual physical violence; or second, doing some act or making some statement to put someone in fear of bodily harm.

The intimidation must be caused by an act knowingly and deliberately done or a statement knowingly and deliberately made by the particular defendant and that it was done in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person.

custody, control, management or possession of that money.

The intentional flight or concealment of a defendant [133] immediately after the commission of a crime or after he is accused of a crime that has been committed is not, of course, sufficient in itself to establish his guilt. It is, however, a fact which if proven you may consider in light of all the evidence, other evidence in the case when determining the guilt or innocence.

If proved, the flight of a defendant after he knows he is to be accused of a crime, may tend to prove that the defendant believed he was guilty. However, flight may not always reflect guilt or guilty. Similarly, feelings of guilt which are sometimes present in innocent people do not necessarily reflect actual guilt.

You are specifically cautioned that you may not use evidence of flight of the defendant as a substitute for proof of guilt. But you may consider it along with all the other evidence presented. Keep in mind, flight does not mean a presumption of guilt. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance attached to such evidence, that is exclusively within the province of the jury.

Here are just a couple of points. You will note that the indictment when you read it charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond [134] a reasonable doubt that the offense is committed on a date reasonably near the date alleged.

explained, drawing the inferences which you find warranted, and finding the facts to which you apply the law as I have given it to you in these instructions.

Consideration of the type or extent or any penalties that may or may not be imposed on the defendant has no place in that process. You are not to be swayed or influenced or concerned in way by the question of any punishment that might be imposed.

Now you have been sworn and chosen as jurors in this case to try the issues of the fact presented by the allegation in the indictment and a denial made by the not guilty plea of the defendant. Both the defendant and the Government have the right to expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

Any verdict you reach in the jury room, whether guilty or not guilty must be unanimous. In other words, to [136] return a verdict you must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because others may think differently or merely to get the case over.

After you have reached a verdict, you are not required to talk to anyone about the case unless the Court would order otherwise.

At this time, I instruct the Courtroom Deputy to call forward the Deputy Marshal who will guard and keep the jury in a safe place and not allow anyone to speak with them or nor to allow anyone to speak for them except their foreperson while the deliberations are in progress.

DEPUTY MARSHAL, SWORN

[138] THE COURT: Does either party wish to address the Court at side before the jury is sent to deliberate?

MR. KLINGEMAN: No, Your Honor.

MR. REILLY: No, Your Honor.

THE COURT: Ladies and gentlemen, if you will recess into the jury room, all of these materials will be supplied to you. Please follow the instructions and keep your deliberations together in the jury room as you deliberate. If you need to recess, you're free to move about the building just so long as all of your deliberations take place in the jury room. We do not need to know who you have chosen to be your foreperson unless, of course, you send out a note which will have to be signed by that person.

And now, as the deliberations begin, we will excuse our alternate who will not go into the jury room except to retrieve any personal possessions.

THE CLERK: All rise.

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA	Case Number 3:97-CR-520 (NJ) 3:98-CR-475 (PA)

v.

FLOYD J. CARTER a/k/a "Daniel O'Reilly"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 28, 1998)

The defendant, FLOYD J. CARTER a/k/a "Daniel O'Reilly", was represented by Brian Reilly, AFPD.

The defendant was found guilty on count(s) 1 of indictment by a jury verdict on 01/23/98 after a plea of not guilty in Cr. 97-520 (NJ); the defendant pled guilty to counts 1-3 of indictment on 8/28/98 in Cr. 98-4754 [sic] (PA). Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2113(a)	Bank robbery	9/9/97	1 (CR. 97-520)
18:2113(b)	Bank larceny	8/27/97	1-3 (Cr. 98-475)

As pronounced on 10/15/98, the defendant is sentenced as provided in pages 2 through 6 of this Judgment.

98-475 (PA) with each count running concurrently with each other, with credit for all time in custody.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

The defendant shall submit to one drug test within 15 days of commencement of supervised

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	VI
Imprisonment Range:	210 months to 240 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ to $ 17,500
Restitution:	$ 11,993

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Career offense finding.

I HEREBY CERTIFY that the above and
foregoing is a true and correct copy
of the original on file in my office.
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
WILLIAM T. WALSH, CLERK
By /s/ Illegible
Deputy Clerk

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400, $100 each on count(s) 1 of indictment in Cr. 97-520, and counts 1-3 of indictment in Cr. 98-475, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 4th day of December, 1998.

/s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

Defendant's SSN: 136-48-0876
Defendant's Date of Birth: 04/27/55
Defendant's mailing address: Monmouth County Correctional Center; 1 Waterworks Road; Freehold, NJ 07728
Defendant's residence address: 29 Conger Avenue; New Brunswick, NJ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 215 months on Count 1 of Cr. 97-520 (NJ) and a concurrent term of 24 months on Counts 1-3 of Cr. 98-475

release and at least two tests thereafter as determined by the probation officer.

If orderd to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall refrain from the excessive use of alcohol and shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment, on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

Restitution in the total amount of $11,993.00 to be divided proportionately to reflect half of the amount of loss sustained by the Sovereign Bank, 1102 Taylorsville Rd., Washington Crossing, NJ and First Federal Savings and Loan Association, 272 W. Bridge St., New Hope, PA

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,

Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1 (a)
May 19, 1999

Before: BECKER, *Chief Judge*,
RENDELL and ROSENN, *Circuit Judges*.

(Filed _____)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a).

After consideration of all contentions raised by the appellant, it is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: June 16, 1999

UNREPORTED – NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5491

UNITED STATES OF AMERICA,

v.

FLOYD J. CARTER,

Appellant

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cr-00520-1
District Judge: Honorable Mary L. Cooper

Submitted Under Third Circuit LAR 34.1(a)
May 19, 1999

Before: BECKER, *Chief Judge*, RENDELL and ROSENN, *Circuit Judges*.

(Filed June 16, 1999)

George S. Leone
Office of United States Attorney
970 Broad Street, Room 700
Newark, NJ 07102

Norman J. Gross
Office of United States Attorney
4th & Cooper Streets
Mitchell H. Cohen Courthouse
One John F. Gerry Plaza
Camden, NJ 08101
Counsel for Appellee

Brian P. Reilly
Office of Federal Public Defender
22 South Clinton Avenue
Station Plaza #4, 4th Floor
Trenton, NJ 08609
Counsel for Appellant

MEMORANDUM OPINION

ROSENN, Circuit Judge.

Appellant Floyd J. Carter and Terry Stillwell were charged in a one-count indictment with bank robbery in violation of 18 U.S.C. § 2113(a) in the United States District Court for the District of New Jersey. Stillwell pleaded guilty and, on January 23, 1998, a jury found Carter guilty of bank robbery. On October 15, 1998, the district court sentenced the defendant, Carter, to 215 months in prison.[1] Defendant appealed. We affirm.

I.

At approximately 2:00 p.m. on September 9, 1997, the defendant entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, wearing several layers of clothing and a ski mask that covered his entire face except for his eyes and mouth. As he entered, a customer, Maria Zahn, was leaving. Ms. Zahn attempted to exit around him, but the defendant pushed her back inside.

---

[1] The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and this court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(1) and (2).

Ms. Zahn was so terrified that she screamed, startling others within the bank.

At that point, Carter ran toward the customer service counter, and with a single leap, vaulted over the counter and through one of the teller windows to the area behind the counter where tellers Anastasia Hairston, Christine Sentech, and Mildred Calacal were standing. Ms. Hairston ran to the office of the branch manager, Robert Phipps, yelling that a robber was after her. Meanwhile, the defendant opened Ms. Hairston's teller drawer and emptied money into a brown paper bag. He then quickly moved to within two feet of where Ms. Sentech and Ms. Calacal stood and proceeded to empty their teller drawers. Meanwhile, Ms. Zahn ran out of the bank, got into her car, laid down on the floor and prayed until the authorities arrived.

After having removed almost $16,000 in currency from the teller drawers, the defendant hurdled back over the teller counter and warned that no one was to follow him. He ran to a getaway car operated by Terry Stillwell, climbed into the trunk, and closed the hatch. The car then sped off. A short while later, the police arrived. At that point, a description of the getaway car was broadcasted over police radio. Eventually, other officers stopped the getaway car and apprehended Carter and his disguise. The defendant subsequently waived his *Miranda* rights and confessed to FBI special agent James Maxwell that he and Stillwell had driven to Hamilton Township from New Brunswick to rob the bank.

II.

The defendant's primary issue on appeal is the district court's decision to reject his request to instruct the jury on bank larceny. The district court's decision to reject his request is subject to plenary review. *See United States v. Price*, 13 F.3d 711, 724 (3d Cir. 1994).

A.

The defendant argues that, even though not charged in the indictment, bank larceny is "a lesser included offense" of bank robbery for purposes of Fed. R. Crim. P. 31(c). He therefore contends that the jury should have been instructed on bank larceny because the theory of his defense at trial was that he took money from the bank without force, violence, or intimidation.

The district court denied the defendant's request on the ground that this court in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), issued shortly before Carter's trial, held that bank larceny is not a lesser included offense of bank robbery. In *Mosley* this court remarked that under Section 2113(a) "the subjective intent of a bank robber to steal is irrelevant; 'the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes.' " *Mosley*, 126 F.3d at 204 (quoting *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976)). Conversely, the *Mosley* court observed that under Section 2113(b), the perpetrator must have the "intent to steal or purloin to satisfy the elements of bank larceny." *Mosley*, 126 F.3d at 204.

The defendant asserts that even under *Mosley* the district court still was obligated to instruct the jury on the defense's theory that he committed bank larceny, not bank robbery. We disagree. *Mosley* rested solely on the legal interpretation of Sections 2113(a) and (b). *See* 126 F.3d at 204. We conclude that the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b). *See* 126 F.3d at 204.

Notwithstanding the holding in *Mosley*, the defendant contends that we should reconsider that decision. He argues that an examination of the language of the statute reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. He notes that the word "purloin" is a synonym of "steal" and that the text of the statute with respect to these terms alternatively defines the same element. He also claims that absent a clear and specific statement by Congress that a particular criminal statute does not require a *mens rea*, this element of intent is presumed to exist. Consequently, he submits that omission of the *mens rea* requirement in the text of the bank robbery statute raises a presumption that *mens rea* is a requisite element of bank robbery. Thus, he submits that the intent to steal is an element of both bank larceny and bank robbery. Finally, he contends that the *Mosley* decision was based on a mistaken and incomplete consideration of the common law history of bank robbery and bank larceny, and an incorrect application of the relevant case law. We disagree with the defendant in all respects

because Congress created a statutory crime of robbery that is set forth fully in Sections 2113(a) and (b).

First, in *Brown*, this court held that specific intent is not an essential element of a violation of Section 2113(a). Second, under the modern robbery statute, Congress did not use the language of the common law to define the offenses of bank robbery and bank larceny. *See Bell v. United States*, 462 U.S. at 360 (citing *Turley*, 352 U.S. at 411-412). Finally, Section 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property. Accordingly, we conclude that our decision in *Mosley* need not be disturbed.

B.

The defendant also contends that the district court misinterpreted and misapplied United States Sentencing Guideline Section 3E1.1 in denying him a reduction in the offense level because he accepted responsibility for the offense. He submits that he accepted responsibility for his criminal conduct for purposes of Section 3E1.1 because he conceded at trial that he committed bank larceny, but denied that his conduct amounted to the offense of bank robbery because he did not use force, violence, or intimidation.

The district court's decision to deny the claim for acceptance of responsibility is reviewed for clear error. *See United States v. Muhammad*, 146 F.3d 161, 167 (3d Cir. 1998). The reduction for acceptance of responsibility generally does not apply to a defendant "who puts the government to its burden of proof at trial by denying the

essential factual elements of guilt, is convicted and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, Application Note 2. At trial, Carter challenged the testimony of Ms. Zahn, claiming that his physical contact with her was wholly accidental, and that she did not scream. He attacked the Government's evidence as to his threatening remark as he fled from the bank. Finally, in his summation, he argued that there was no implicit threat of violence or injury to discourage a pursuit. These challenges to the Government's case are inconsistent with an acceptance of responsibility.

Accordingly, we conclude that the district court committed no error in rejecting defendant's request for a reduction in his offense level. *See United States v. DeLeon Rodriguez*, 70 F.3d 764, 767 (3d Cir. 1995) (district court properly denied acceptance reduction after appellant pleaded not guilty and contested his factual guilt beyond a mere legal challenge); *United State v. Veksler*, 62 F.3d 544, 551 (3d Cir. 1995).

C.

Lastly, the defendant contends that the district court erroneously denied his motion for acquittal pursuant to Fed. R. Crim. P. 29 because the Government failed to establish that he used force, violation, or intimidation to perpetrate the predicate offense. When a jury returns a verdict, this court's review is plenary and, in employing that review, we must view the evidence in the light most favorable to the Government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Burks v. United States*, 437 U.S. 1, 17 (1978); *United States v. Leon*, 739 F.2d 885, 890 (3d Cir. 1984).

To obtain a conviction for unarmed bank robbery under Section 2113(a), the Government must prove that the defendant: (1) used force and violence or intimidation; (2) took or attempted to take from the person or presence of another, (3) money, (4) in the care, custody, or control of a federally insured bank. To establish "intimidation" under Section 2113(a), the Government need show only that "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *Untied* [sic] *States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996). The evidence shows that the defendant wore a ski mask that covered his entire face except for his eyes and mouth, and that he gained access to the teller cages by forcefully, speedily, and impermissibly vaulting the customer service counter. These abnormal activities plainly were acts of intimidation, as well as his exertion of force on Ms. Zahn. We see no error in the district court's denial of the defendant's motion for acquittal.

III.

For the foregoing reasons, the judgment of conviction and sentence of the court will be affirmed.

/s/ Max Rosenn
Circuit Judge

Supreme Court of the United States

No. 99-5716

Floyd J. Carter,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 13, 1999

Supreme Court, U.S.
FILED
FEB 8 2000
CLERK

No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER FLOYD J. CARTER

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
FEDERAL PUBLIC DEFENDER
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347
Counsel for Petitioner Floyd J. Carter
**Counsel of Record*

RECEIVED
FEB 11 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether federal bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of federal bank robbery, 18 U.S.C. § 2113(a), as a matter of law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
I. Under the Textual "Elements" Test, Bank Larceny is a Lesser Included Offense of Bank Robbery	8
II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, Under Which Larceny is a Lesser Included Offense of Robbery	14
III. The History of the Statutes At Issue Confirms That the Definitions of Bank Larceny and Bank Robbery are Firmly Rooted in the Common Law	26
IV. Bank Larceny is not Distinguished From Bank Robbery by Separate "Carries Away" or Valuation Elements	38
CONCLUSION	45
STATUTORY APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 31, 43

Bell v. United States, 462 U.S. 356 (1983) 7, 37

Duffy v. State, 56 N.E. 209 (Ind. 1900) 24

Evans v. United States, 504 U.S. 255 (1992) 15, 37

Heflin v. United States, 358 U.S. 415 (1959) 13, 36

Jerome v. United States, 318 U.S. 101 (1943) ... 28, 29, 34

Jones v. United States, 119 S. Ct. 1215 (1999) 43

In re Lewis, 83 F. 159 (D. Wash. 1897) 29

Morissette v. United States, 342 U.S. 246 (1952) 17, 20, 26, 33, 35

Neder v. United States, 119 S. Ct. 1827 (1999) 15, 16, 17, 26, 39

People v. Clary, 13 P. 77 (Cal. 1887) 24

People v. Kennedy, 11 N.Y.S. 244 (N.Y. Gen. Term 1890) 24

Prince v. United States, 352 U.S. 322 (1957) 32, 36, 37

Regina v. Desmond, 3 All E.R. 587 (1964) 23

Regina v. Skivington, 1 All E.R. 483 (C.A. 1967) 23

Rex v. Hall, 172 Eng. Rep. 477 (Gloucester Assizes 1828) 23

Schmuck v. United States, 489 U.S. 705 (1989) ... 7, 9, 10, 38

Staples v. United States, 511 U.S. 600 (1994) ... 16, 19, 20

State v. Culpepper, 238 S.W. 801 (Mo. 1922) 30

TABLE OF AUTHORITIES – Continued

Page

State v. Hatch, 116 P. 286 (Wash. 1911) 24

State v. Morris, 122 S.E. 914 (W. Va. 1924) 30

State v. Perley, 30 A. 74 (Me. 1894) 24

Taylor v. United States, 495 U.S. 575 (1990) 15

Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519 (1947) 31

United States v. Bailey, 444 U.S. 394 (1980) 14

United States v. Belt, 516 F.2d 873 (8th Cir. 1975) 44

United States v. Brown, 547 F.2d 36 (3d Cir. 1976) 6

United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998) ..... *passim*

United States v. Richardson, 687 F.2d 952 (7th Cir. 1982) 34

United States v. Turley, 352 U.S. 407 (1957) 15, 27

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 16

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 16, 17

FEDERAL STATUTES

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793 ...12, 27

Act of May 18, 1934, ch. 304, § 4, 48 Stat. 793 29

Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 .....30, 31

TABLE OF AUTHORITIES – Continued

Page

Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683 (1948) 33

Act of June 29, 1940, ch. 455, 54 Stat. 695 (1940) 12

Economic Espionage Act of 1996, Pub. L. No. 104-294, § 606(a), 110 Stat. 3488 41

12 U.S.C. § 588b 12, 13, 31, 33

18 U.S.C. § 1951 37

18 U.S.C. § 2113 ..... *passim*

18 U.S.C. § 3559 25

18 U.S.C. § 641 35

18 U.S.C. § 661 44

26 U.S.C. § 5861(d) 19

28 U.S.C. § 1254(1) 1

FEDERAL RULES

Federal Rule of Criminal Procedure 20 5

Federal Rule of Criminal Procedure 31(c) 7, 8

Local Appellate Rule 30.3(c) 5

SENTENCING GUIDELINES

United States Sentencing Guidelines Manual § 2B1.1(b) 44

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

4 *William Blackstone, Commentaries* ..... *passim*

Black's Law Dictionary (5th ed. 1979) 20, 27

78 *Cong. Rec.* 8132-33 (1934) 28

78 *Cong. Rec.* 2946-47 (1934) 28

78 *Cong. Rec.* 5738 (1934) 28

78 *Cong. Rec.* 8133 (1934) 28

2 *East's Pleas of the Crown* ch. 16 .....21, 22

The Fisherman's Case (1528), 14(2) Digest ¶ 8862 (2d reissue, 1993) 22

1 *Hawkins' Pleas of the Crown* ch. 33 21

H.R. Rep. No. 73-1461 (1934) 29

H.R. Rep. No. 80-304 (1947) 13, 33, 34, 41

H.R. Rep. No. 76-1668 (1940) 12

2 *Russell on Crimes* (4th ed. 1865) 22, 23

S. Rep. No. 76-1801 (1940) 12

S. Rep. No. 73-537 (1934) 28

S. Rep. No. 73-1259 (1937) 32

2 *LaFave & Scott, Substantive Criminal Law* § 8.11 (1986) 39

Webster's New Collegiate Dictionary (2d ed. 1974) 11

OPINIONS BELOW

The court of appeals' opinion is unreported. Its judgment and opinion are provided at pages 78 to 87 of the Joint Appendix. The district court's opinion, also unreported, was stated on the record at trial and is provided in the Joint Appendix. J.A. 23-32.

JURISDICTION

The court of appeals entered judgment in this case on June 16, 1999. J.A. 78-79. Mr. Carter filed his petition for a writ of certiorari on August 12, 1999. The petition was granted on December 13, 1999. J.A. 88. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The central statute in this case is the "Bank robbery and incidental crimes" provision of Chapter 103 ("Robbery and Burglary") of Title 18. The complete text of this statute, 18 U.S.C. § 2113, is set forth in the statutory appendix to this brief. 1a-3a The statutory appendix also includes the pre-1948 version of the statute, 12 U.S.C. § 588b. 4a-5a Congress made the 1948 amendments, in part, to conform the statute with 18 U.S.C. § 1 (since repealed), also provided in the statutory appendix. 5a

STATEMENT OF THE CASE

The federal criminal code today defines thousands of crimes, and Congress adds still more prohibitions to it in virtually every session. Some of the code's proscriptions are enacted only after the most careful drafting and thorough deliberation. Judicial construction of these particular laws may well be a straightforward affair. But other criminal prohibitions are the product of less meticulous drafting and more hurried consideration. Some of these latter statutes have been in the code for many decades, while others – although once exemplars of clarity – present a muddier picture resulting from congressional additions and deletions. Interpretation of these more workaday statutes would be chaotic and unpredictable if the federal courts were to approach the matter with a literalism that is ahistorical, shut off from centuries of practice that the common law embodies and that are both the original historical foundation for these statutes and the guide for subsequent legislative amendments. For these reasons, this Court has long held that the courts can and *must* look to the Anglo-Saxon common law of crimes to guide and inform their construction of federal criminal law. Inexplicably, the United States Court of Appeals for the Third Circuit set its face against this Court's precedent when it interpreted the bank larceny and robbery provisions at issue in this case. The resulting misinterpretation of the statute cannot stand.

1. On September 9, 1997, petitioner Floyd J. Carter, unarmed and wearing a ski mask to conceal his identity, ran into the Collective Savings Bank in Hamilton, New Jersey, for the purpose of stealing money from the bank.

C.A. App. 165, 155.[1] He had waited outside the bank until he thought all the customers had left. *Id.* at 156 ("I thought nobody was in there."). On his way into the bank Carter bumped into a customer as she was walking out the door. *Id.* With only one goal in mind – to "take the money and run" – Carter quickly stepped around the customer. *Id.* at 157. He proceeded to an unoccupied teller station, specifically so that he would not "scare nobody or nothing." *Id.* at 159-60.

Mr. Carter jumped over the unoccupied teller station, pulled open the drawer, and emptied it of its money. C.A. App. 160. He ran to two other drawers behind the counter, emptying them into a bag as well. *Id.* As Carter was filling his bag, he told the tellers not to worry and assured them that he would not hurt anybody. *Id.* at 160-61. After he finished collecting money from the open teller drawers, he went back to the unattended teller station to avoid direct contact with the tellers and jumped back over the counter. *Id.* at 162. He seized approximately $16,000 in cash from the teller stations. *Id.* at 101-02; J.A. 82. As he ran out the door, petitioner told the bank employees, "Don't bother following me, I run fast." C.A. App. 164.

Later that same day, the police caught Mr. Carter.[2] During questioning by Special Agent James Maxwell, Federal Bureau of Investigation, Carter "admitted that he

---

[1] "C.A. App.," followed by a page number, refers to the appendix filed with petitioner's brief in the Third Circuit.

[2] Terry Stilwell, Carter's getaway driver, J.A. 82, was also caught that day. He entered into a plea agreement and was sentenced to 28 months in prison. C.A. App. 5-6.

went into the bank, he took the money, and he said he did not use a weapon." C.A. App. 116-17. Specifically, Carter told Special Agent Maxwell that he went to the bank so that he could "snatch a money bag," saying "I went in the bank and took the money, that's what I did." *Id.* at 121. Indeed, Mr. Carter never denied his involvement, his conduct, or the facts surrounding the theft at the Collective Savings Bank. He was charged in September 1997 in the District of New Jersey with bank robbery in violation of 18 U.S.C. § 2113(a). J.A. 2-3. After admitting to all the basic facts, C.A. App. 116-17, Carter pled not guilty to the charge of bank robbery, *id.* at 3 (Docket Entry No. 5).

2. At a status conference on January 20, 1998, the district court addressed Mr. Carter's pretrial motion requesting that the court instruct the jury on the lesser included offense of bank larceny.[3] J.A. 10-15. The court preliminarily concluded that it would be improper to give an instruction that bank larceny is a lesser included offense of bank robbery. *Id.* In reaching this conclusion, the district court expressly relied on the Third Circuit's decision in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998) (following petitioner's death). According to the district court, "[i]t's a legal decision and we simply, by analyzing the text of these two statutes, the bank robbery and the bank larceny statute, *we decline to follow the majority of the circuits*" on the lesser included offense question. J.A. 14 (emphasis added).

[3] The motion and the corresponding proposed jury charge are provided in the joint appendix. J.A. 4-9.

3. Mr. Carter's trial lasted for two days in January 1998. Carter moved for acquittal after the close of Respondent's case, arguing that Respondent failed to produce sufficient evidence to sustain a conviction. J.A. 16-20. The district court denied the motion for acquittal, *id.* at 23-32, and indicated that the requested larceny instruction would not be given to the jury, *id.* at 29-32. In doing so, the district court again relied on the *Mosley* decision, explaining that "as a matter of law in this Circuit . . . the bank larceny offense is not a lesser included offense of the bank robbery offense because the bank larceny offense has a specific intent to steal element not found in the bank robbery offense." *Id.* at 30. At the close of all the evidence, petitioner renewed his motion for acquittal, and the motion was again denied. C.A. App. 191-92. The court instructed the jury on the charge of bank robbery alone. J.A. 44-63. The jury returned a verdict of guilty on January 23, 1999. J.A. 64, 71.

4. Prior to sentencing, Mr. Carter was indicted in the Eastern District of Pennsylvania on three counts of bank larceny, C.A. App. 263-65, on the basis of conduct remarkably similar to that for which he was convicted of bank robbery in the District of New Jersey. *See* Presentence Investigation Report at ¶31.[4] In each instance, Carter had run into a bank wearing a ski mask, jumped over a teller counter, and taken money from a teller drawer. *Id.* at ¶31. Carter pled guilty to the Pennsylvania indictment pursuant to Federal Rule of Criminal Procedure 20, and

[4] Pursuant to Local Appellate Rule 30.3(c), the Presentence Investigation Report was filed with the Third Circuit on appeal.

the case was transferred to New Jersey to be consolidated, for sentencing purposes, with the bank robbery conviction. *Id.* at ¶¶3-8.

The district court initially sentenced Mr. Carter to concurrent prison terms of 215 months for the bank robbery and 120 months for each of the bank larcenies. J.A. 65-66. After Carter moved to amend the judgment, C.A. App. 332, the court resentenced Carter to concurrent prison terms of 215 months for the bank robbery and 24 months for each of the bank larcenies. J.A. 71-73.

5. Mr. Carter appealed his conviction. He argued that, among other things, the district court had erred by refusing to instruct the jury on the lesser included offense of bank larceny.[5] J.A. 83. The Third Circuit concluded that "the district court committed no error in refusing to instruct the jury on bank larceny because this court's holding in *Mosley* appropriately rested solely on a legal interpretation of Sections 2113(a) and (b)." J.A. 84. The court of appeals also cited its decision in *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976), in which it had held that "specific intent is not an essential element of a violation of" the bank robbery statute. J.A. 85. Next, the court

[5] Carter also demonstrated that the facts of his case clearly warranted the bank larceny instruction, Petitioner's Opening Third Circuit Brief at 13-17, and argued that the district court should have granted a judgment of acquittal due to insufficient evidence to sustain a conviction, *id.* at 42-43. Carter relied on the testimony of Respondent's witnesses – including Maria Zahn, the customer, C.A. App. 38-42; Marjorie Cudney, the customer service representative, *id.* at 72-73; and Robert Phipps, the branch manager, *id.* at 111 – who consistently testified that Carter made no demands of them or threats against them.

reiterated its conclusion that Congress, in the current robbery statute, did not employ common law language to define bank robbery and bank larceny. *Id.* (citing *Bell v. United States*, 462 U.S. 356, 360 (1983)). Finally, according to the Third Circuit, "[s]ection 2113(b) is broader than the common law definition because common law larceny was limited to thefts of tangible personal property." *Id.* These were essentially the same reasons the Third Circuit articulated to support its decision in *Mosley*.

SUMMARY OF THE ARGUMENT

At common law, larceny was unquestionably a lesser included offense of robbery. Congress drew on the familiar language of the common law definitions of larceny and robbery to draft the bank larceny and bank robbery provisions at issue in this case. The text and structure of the statute, when interpreted – as they must be – with the guidance and understanding of the common law of crimes, compel the conclusion that the elements of bank larceny are a subset of the elements of bank robbery.

ARGUMENT

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court adopted the "elements approach" to deciding whether a defendant is entitled, under Federal Rule of Criminal Procedure 31(c),[6] to have the jury instructed on

[6] Rule 31(c) provides, in relevant part, that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c).

a lesser included offense of the crime charged. Under the "elements test,"

> one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. The required "comparison is [thus] appropriately conducted by reference to the statutory elements of the offense in question." *Id.* at 718.

The Third Circuit erred in concluding that bank larceny is not a lesser included offense of bank robbery for purposes of Rule 31. Indeed, the Third Circuit's conclusion flatly contravenes the properly interpreted text and structure of the bank larceny and bank robbery provisions.

I. Under the Textual "Elements" Test, Bank Larceny is a Lesser Included Offense of Bank Robbery.

Section 2113 of the federal criminal code, Title 18, defines the offense of bank robbery as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (1994 & Supp. III). Section 2113 also sets forth the definition of bank larceny. Specifically, this latter offense is defined, with two grades of punishment, as follows:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 2113(b) (1994 & Supp. III).

Applying the textual elements test adopted in *Schmuck v. United States*, 489 U.S. 705, 706 (1989), it is evident that bank larceny represents a textual subset of bank robbery, with elements identical to bank robbery save for the "force and violence, or by intimidation" element of bank robbery. Bank larceny requires proof that the accused took "any property or money or any other thing of value." Bank robbery, too, can be shown by proof that the accused took "any property or money or any other thing of value." That which is taken must also, under both provisions, be proved to "belong[ ] to, or [be] in the care, custody, control, management, or possession

of any bank, credit union, or any savings and loan association."

Bank larceny requires proof that the taking occurred "with intent to steal or purloin." To be sure, these very same words are not found in the bank robbery provision. And it was the absence of these very same words from the definition of bank robbery that led the Third Circuit to "reject the majority view that bank larceny is a lesser included offense of bank robbery." *United States v. Mosley*, 126 F.3d 200, 206 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998). According to the Third Circuit, "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny as defined in subsection (b) includes this element." *Id.* at 204.

Schmuck does not require such a mechanical literalism. Even though the Court emphasized in *Schmuck* that the analysis must be "textual," 489 U.S. at 720, it did *not* hold that the very same words that define an element in the lesser included offense must appear in the definition of the greater offense. Rather, what is required is simply "a careful comparison of the statutory elements of" the crimes, *id.*, however those elements may be worded. The Third Circuit's error therefore lies in adopting a sort of "magic words" approach that *Schmuck* itself avoided.

A careful comparison of statutory elements, pursuant to the Court's dictates in *Schmuck*, yields a different result. Although the definition of bank robbery in section 2113(a) does not contain the very words "with intent to

steal or purloin," that definition does contain terms tantamount to "steal or purloin" – namely, "takes . . . from the person of another." "Purloin" is a synonym for "steal," and "steal" is commonly defined as "to take the property of another." *Webster's New Collegiate Dictionary* 937, 1138 (2d ed. 1974). The terms employed in both provisions thus closely correspond with one another and are alternative means for defining the same intent element.

The structure of section 2113 also strongly supports the conclusion that bank larceny is a lesser included offense of bank robbery. First, subsection (c) creates a related "receiving stolen property" crime. Specifically, subsection (c) provides as follows:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

18 U.S.C. § 2113(c). If bank larceny were held not to be a lesser included offense of bank robbery, this unlawful receipt provision would create quite an anomaly. It would be a crime knowingly to receive ill-gotten gains from a bank larcenist but *not* from a bank robber. Why would Congress want to punish one who receives loot from a bank larcenist but not another who receives loot from a bank robber? Because bank larceny *is* a lesser included offense of bank robbery, however, the mystery disappears: anyone who commits the offense of bank robbery

necessarily commits the lesser offense of bank larceny, and thus one who knowingly receives stolen property from a bank robber is just as guilty under section 2113(c) as one who knowingly receives stolen property from a bank larcenist.

The history of section 2113(c) buttresses this conclusion. When this unlawful receipt offense was added to the statute in 1940, Act of June 29, 1940, ch. 455, 54 Stat. 695, the prohibitions on bank robbery and bank larceny were set forth in the *same* part of the statute, subsection (a) of 12 U.S.C. § 588b (1940).[7] And this new offense, set forth in subsection (c), was defined as receiving property "taken from a bank in violation of subsection (a)," *i.e.*, by means of bank larceny or bank robbery. 12 U.S.C. § 588b(c) (1940). The legislative history of the 1940 enactment demonstrates that Congress sought to punish receipt from a bank robber or from a bank larcenist equally.[8] In 1948, when 12 U.S.C. § 588b was recodified at

[7] The resulting version of 12 U.S.C. § 588b is set forth in the statutory appendix to this brief. 4a-5a

[8] *See Prohibiting Receipt, Possession, or Disposition of Money or Property Feloniously Taken From Federal Banks*, H.R. Rep. No. 76-1668, at 1 (1940) ("Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission."); *Punishment for Receivers of Loot From Bank Robbers*, S. Rep. No. 76-1801, at 1 (1940) ("The Act of May 18, 1934, made it a crime to feloniously (*a*) take or attempt to take property, or (*b*) to assault persons in such attempt from any bank a member of the Federal Reserve System or organized or operating under the laws of the United States. [¶]This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine

18 U.S.C. § 2113, subsection (c) on unlawful receipt was amended to refer to the separate bank larceny offense found in subsection (b), just as it does today. The purpose of this amendment was *not* to restrict the offense to receipt of stolen property from a bank larcenist alone. Rather, as the Reviser's Notes to the 1948 recodification explain, the purpose of the amendment was to ensure that if the stolen property were the result of a bank larceny, the different punishments for petit and grand larceny would also apply to the receiver: "the provisions of subsection (b) measuring the punishment by the amount involved were extended and made applicable to the receiver as well as the thief." House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947).

Second, subsection (a), in addition to defining the offense of bank robbery, also criminalizes "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny." 18 U.S.C. § 2113(a). This provision – defining a type of bank burglary – puts entering a bank with the intent to commit bank larceny on a par with entering a bank with the intent to commit bank robbery.[9] Such parity of treatment suggests that Congress viewed bank

and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute."). This legislative history is discussed in *Heflin v. United States*, 358 U.S. 415, 419 (1959), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54 (1968).

[9] The same was true under the prior version of the statute. *See* 12 U.S.C. § 588b(a) (1940).

larceny and bank robbery as two points on the lesser/greater offense continuum.

The text and structure of section 2113 thus uniformly indicate that bank larceny is a lesser included offense of bank robbery. However, should any doubt remain, the matter is conclusively resolved by reviewing the Anglo-Saxon common law of crimes.

II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, Under Which Larceny is a Lesser Included Offense of Robbery.

On its face, the bank robbery provision appears to lack the specific intent element that appears in the bank larceny provision. Indeed, the bank robbery provision appears to lack an intent element altogether. However, appearances can be deceiving. The specific intent to steal, an element that is common to both bank robbery and bank larceny, has its roots in the common law crimes of robbery and larceny. Congress used common law language to define the bank robbery and bank larceny prohibitions and thus expressly incorporated the specific intent element into the definition of bank robbery.

A. The Common Law of Crimes Guides the Proper Interpretation of Federal Criminal Statutes.

This Court has long recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). Indeed, "[i]t is a familiar 'maxim that a statutory term is generally presumed to have its

common-law meaning.' " *Evans v. United States*, 504 U.S. 255, 257 (1992) (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)); *see also United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.") This common law background guides the proper construction of federal criminal statutes, and Congress must express its intent to depart from common law definitions in the clearest terms. Importantly, this interpretive principle has such force that it can mandate the presence of an element in the definition of a federal crime even where the statute makes *no mention* of that element.

For example, in *Neder v. United States*, this Court unanimously held that "materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes." 119 S. Ct. 1827, 1831 (1999). Indeed, the Court so held despite the fact that "none of the fraud statutes [at issue] . . . even mentions materiality." *Id.* at 1839. The operative statutory language was the prohibition, found in all three statutes, on "any scheme or artifice to defraud." *Id.* Recognizing it as a "well-settled rule of construction," this Court explained "that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms." *Id.* at 1840 (internal quotations and modification omitted). In the case of fraud, it was clear that "the common law could

not have conceived of 'fraud' without proof of materiality." *Id.* Materiality was therefore a necessary element of the fraud statutes in question:

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality unless the statute otherwise dictates.

Id. (internal quotations and footnote omitted). This Court also rejected the government's contention that the existence of other criminal statutes that mention materiality could rebut the presumption of common law meaning, holding that the necessary "rebuttal can only come from the text or structure of the fraud statutes [at issue] themselves." *Id.* at 1841 n.7.

This presumption of common law meaning has special force in the context of determining the requisite level of intent for a federal crime. Indeed, in numerous cases this Court has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[10] *United*

[10] The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v. United States*, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in *'limited* circumstances.' " *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (collecting and analyzing cases).

For example, in the seminal case of *Morissette v. United States*, 342 U.S. 246 (1952), the Court construed 18 U.S.C. § 641, a general prohibition on the theft of United States Government property.[11] Mr. Morissette had been convicted of "unlawfully, wilfully and knowingly steal[ing] and convert[ing]" spent bomb casings belonging to the United States Government. 342 U.S. at 248. The core of his defense, rejected by both the trial court and the court of appeals, was that "he believed the casings were cast-off and abandoned, that he did not intend to steal the property," *id.*, and that section 641 required proof of an intent to steal, *id.* at 249-50. This Court, after carefully reviewing the several statutes that were drawn together and recodified as section 641, concluded that, despite the trimming of specific intent terminology from the recodified statute, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Rejecting the government's contention that the offense of conversion under section 641

[11] Section 641 provides, as it did when *Morissette* was decided, as follows: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [s]hall be fined . . . or imprisoned. . . . " *Compare* 18 U.S.C. § 641 (1994) *with Morissette v. United States*, 342 U.S. 246, 248 (1952) (quoting section 641).

required general intent alone,[12] the Court turned to the common law as the touchstone for interpreting the statute:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative. . . . [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. at 263. The Court thus drew on the common law to imply a specific intent element – the intent to steal – for a statute that, after recodification in 1948 (unlike before),

---

[12] "That the removal of [the spent casings] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances." *Morissette*, 342 U.S. at 276 (emphasis in original).

was silent on the question of intent. Put another way, this Court held that, by dropping express requirements of felonious intent from the offenses recodified at section 641 (with Reviser's Notes stating that "[c]hanges were made in phraseology"), Congress was held *not* to have given such "contrary direction." *See id.* at 266 n.28 (emphasis added).

More recently, in *Staples v. United States*, 511 U.S. 600 (1994), the question presented was whether, to obtain a conviction under section 5861(d) of the National Firearms Act, 26 U.S.C. § 5861(d), the government must prove that the defendant knew that the weapon he possessed had the characteristics that brought it within the prohibition of that section.[13] The Court held that the government must prove such knowledge, reasoning in part as follows:

> Section 5861(d) is silent concerning the *mens rea* required for a violation. . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.

511 U.S. at 605. After distinguishing the case law on strict liability offenses, this Court concluded that "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d)." *Id.* at 619.

---

[13] Section 5861(d) makes it a crime to possess a fully automatic firearm that is not properly registered with the federal government.

This Court's decisions in cases such as *Morissette* and *Staples* demonstrate that the presumption of common law meaning that attaches to common law terms in federal criminal statutes has special force with respect to the element of intent. In a sense, these cases simply illustrate the basic proposition, long a feature of the common law of crimes, that, "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, *Commentaries* *21. With respect to the question of intent, a review of the common law definitions of larceny and robbery plainly demonstrates that both crimes required proof of the specific intent to steal.

B. At Common Law, Both Larceny and Robbery Required Proof of the Same Criminal Intent To Steal.

At common law, robbery was defined as an aggravated form of larceny. For example, in his chapter on "Offences Against Private Property," Blackstone defined "simple larciny" as "the felonious taking and carrying away of the personal goods of another." 4 William Blackstone, *Commentaries* *230.[14] He emphasized that "[t]his taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*."[15] *Id.* at *232. Interestingly, Blackstone also

[14] Citations are to a facsimile of the first edition of 1765-1769 published by the University of Chicago Press.

[15] "Animo furandi" is the "intent to steal," and "lucri causa" means "for the sake of lucre, or gain." *Black's Law Dictionary* 81, 855 (5th ed. 1979).

observed that the punishment for simple larceny varied depending upon the amount taken: "when it is the stealing of goods above the value of twelvepence, [it] is called *grand* larciny; when of goods to that value, or under, [it] is *petit* larciny." *Id.* at *229. It was also clear, however, that these grades of larceny were "considerably distinguished in their punishment, *but not otherwise*." *Id.* (emphasis added).

Robbery, in turn, was simply a "compound" form of larceny. For Blackstone, "*compound* larciny is such as has all the properties of former, but is accompanied with one of, or both, the aggravations of a taking from one's *house* or *person*," *id.* at *240, and "[l]arciny from the *person* is either *privately* stealing; or by open and violent assault, which is usually called *robbery*," *id.* at *241. Put another way, "previous putting in fear is the criterion that distinguishes robbery from other larcinies." *Id.* at *242. Blackstone thus defined robbery as "[o]pen and violent larciny from the *person*," and "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear." *Id.* at *241. Other treatises on the English common law of crimes recognize the same principles as are set forth in Blackstone's *Commentaries*.[16]

[16] 2 *East's Pleas of the Crown* ch. 16, § 1 (larceny and robbery "are intimately connected, the one being included in the other"), § 124 (robbery, "an aggravated larceny," is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear") (1803 ed.); 1 *Hawkins' Pleas of the Crown* ch. 33, § 1 (larceny is "a felonious and fraudulent taking, and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of His house, above the Value of twelve pence"),

Both larceny and robbery required the same criminal intent to steal to be shown. This is illustrated by the fact that, at common law, a charge of robbery could not be sustained where the intent to steal was found lacking. 2 *East's Pleas of the Crown* ch. 16, § 98 at 661-62 (1803 ed.). For example, in *The Fisherman's Case* (1528),[17] a robbery charge was defeated on the ground that the accused gave money in exchange for the victim's property. According to the report of the case in *East's Pleas of the Crown*,

> A traveller met a fisherman with fish, who refused to sell him any; and he by force and putting in fear took away some of his fish, and threw him money much above the value of it: and judgment was respited, because of the doubt whether the intent were felonious on account of the money given.

Id.; *see also* 4 Blackstone, *Commentaries* *242 ("it is doubted, whether the forcing of a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery").

Similarly, taking the property of another from his person by violence under a mistaken claim of right was

---

ch. 34, §§ 1, 3 (robbery, a form of "[m]ixt or complicated larceny," is "a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear") (1716 ed.); 2 *Russell on Crimes* 98 ("Robbery from the person appears to be well defined as 'a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear.' "), 101 ("robbery is an aggravated species of larceny") (4th ed. 1865).

[17] *See* 14(2) Digest ¶ 8862 (2d reissue, 1993) (dating *The Fisherman's Case* to 1528).

not robbery. 2 *Russell on Crimes* 105 (4th ed. 1865) ("If a party *bonâ fide* believing that property in the personal possession of another belongs to him, take the property away from such person with menaces and violence, this is not robbery. . . . "). For example, in *Rex v. Hall*, a man indicted for robbing a gamekeeper of trap wire and a captured pheasant was acquitted on the ground that he had a good faith belief that he was recovering his own property. 172 Eng. Rep. 477, 478 (Gloucester Assizes 1828) ("if the Jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of the opinion that the prosecution must fail"). More recently, in *Regina v. Skivington*, the court reversed a robbery conviction, reasoning that the accused's demand for his wife's wages from her employer, although made at knife point, was made under a good faith claim of right. 1 All E.R. 483 (C.A. 1967). According to the court, "larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defense to larceny, then it negatives one of the ingredients in the offence of robbery." *Id.* at 485.

All these authorities make clear, larceny was a lesser included offense of robbery at common law. The English courts have adhered to this view down to the present time. *See, e.g., Regina v. Desmond*, 3 All E.R. 587, 591 (1964) (reducing robbery conviction to larceny conviction, on ground that in "the present case of robbery with violence, the first thing that the prosecution must do is to prove larceny and then go on to prove that that larceny which they have proved has occurred in certain particular circumstances"). In the United States, at the turn of the

nineteenth century, state courts similarly recognized this feature of the common law crimes of larceny and robbery. *See, e.g., People v. Clary*, 13 P. 77, 78 (Cal. 1887) ("Robbery is larceny, with the element of force or intimidation added."); *Duffy v. State*, 56 N.E. 209, 209 (Ind. 1900) ("It is true, the principal charge against appellant, under the indictment of which he was convicted, is that of robbery. The offense, however, of larceny, is included and involved in that charge."); *State v. Perley*, 30 A. 74, 76 (Me. 1894) ("robbery is characterized by the common law as compound or aggravated larceny"); *People v. Kennedy*, 11 N.Y.S. 244, 246 (N.Y. Gen. Term 1890) ("There can be no robbery without larceny, and hence the accusation of robbery includes that of larceny, the greater including the lesser."); *State v. Hatch*, 116 P. 286, 287 (Wash. 1911) ("Robbery includes larceny; the essential difference between them being the element of force or violence, necessary to establish robbery, but not an essential of larceny."). Accordingly, centuries of case law and commentary specifically confirm that both robbery and larceny required proof of the same criminal intent to steal.

C. Bank Robbery and Bank Larceny Require Proof of the Same Criminal Intent to Steal.

The common law status of larceny as a lesser included offense of robbery is not open to doubt. Congress acted within this tradition when it criminalized bank robbery and bank larceny using the language of Blackstone and other common law authorities.

Section 2113(a) criminalizes "[w]hoever, *by force and violence, or by intimidation, takes,* or attempts to take, *from*

the person or presence of another, or obtains or attempts to obtain by extortion *any property or money or any other thing of value* belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a) (emphasis added). Even putting aside the evolution of the definition since the bank robbery prohibition was first enacted in 1934, *see infra* at 27-30, this current definition obviously incorporates the common law definition of robbery. The similarity of bank robbery's definition to that of common law robbery is striking, as is demonstrated by even a cursory review of common law commentators such as Blackstone ("the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear"), East ("felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"), and Hawkins ("a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear"). *See supra* at 20-23 & n.16; *see also* 18 U.S.C. § 3559(c)(2)(F)(i) (1994) (classifying the crimes defined in sections 2111, 2113, and 2118 as "robbery" and grouping robbery with many other federal specific intent crimes).

In order to conclude – as the Third Circuit has – that bank larceny is distinguished from bank robbery by the specific intent to steal, one would have to conclude that the bank robbery provision does *not* include such an "intent to steal" element. But that conclusion is squarely at odds with the common law definitions of larceny and robbery that the text of section 2113 so obviously incorporates. Where, as here, the common law serves as the basis for a statute, the "cluster of ideas" that surrounds a

common law term must supply the meaning for that common law term in the statute. *Morissette*, 342 U.S. at 263. Indeed, "under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses," one "must *presume* that Congress intended" to incorporate a specific intent to steal element in its definition of bank robbery "unless the statute otherwise dictates." *Neder*, 119 S. Ct. at 1840. Any superficial textual discrepancies between section 2113(a) and (b) must therefore be resolved by applying the established view of the common law, adopted by Congress, that both robbery and larceny alike require proof of the specific intent to steal.

III. The History of the Statutes at Issue Confirms That the Definitions of Bank Larceny and Bank Robbery are Firmly Rooted in the Common Law.

The bank robbery and bank larceny provisions of 18 U.S.C. § 2113 took their current form in 1948, as part of the overall recodification of federal criminal law in Title 18. The full history of these two provisions consists of three distinct stages: the passage of the original bank robbery act in 1934, the expansion of the act to criminalize bank larceny and unlawful entry in 1937, and the rephrasing of the act as part of the 1948 recodification. At each of these three stages, Congress used the language of the common law to define the offenses of bank robbery and bank larceny. By using this common law language, Congress included the common law specific intent element of robbery in the statutory offense.

A. Congress Used Common Law Language in the 1934 Act.

Bank robbery was first made a federal crime in 1934. The relevant act, in terms taken virtually verbatim from common law sources such as Blackstone, East, and Hawkins, was as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793; *see, e.g.*, 4 William Blackstone, *Commentaries* *241 (defining robbery as "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear"). The phrase "feloniously takes," in particular, signifies that the criminal intent to steal is an element of the bank robbery offense. *See United States v. Turley*, 352 U.S. 407, 410 n.4 (1957) ("felonious" means "having criminal intent"); *Black's Law Dictionary* 555 (5th ed. 1979) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal."). Congress thus used the language of the common law to create the offense of bank robbery, including the intent to steal as an element thereof.

The legislative history of the 1934 act further supports the conclusion that Congress included the common law intent element in the bank robbery provision. The bill was introduced as one of thirteen measures proposed by

the Attorney General for helping local law enforcement cope better with the interstate activities of organized crime. 78 Cong. Rec. 2946-47 (1934) (introducing bills prepared by the Department of Justice, with an explanatory letter from the Attorney General). According to the Justice Department, the bank bill in particular was "directed at one of the most serious forms of crime committed by gangsters who operate habitually from one State to another in robbing banks." S. Rep. No. 73-537, at 1 (1934) (quoting Department of Justice memorandum); *see also Jerome v. United States*, 318 U.S. 101, 102 (1943) (bank robbery act responded to concerns "over interstate operations by gangsters against banks – activities with which local authorities were frequently unable to cope").

In its original form, the bill criminalized not only bank robbery, but also bank burglary and bank larceny. S. 2841, 73d Cong. §§ 2-4 (1934) (reprinted at 78 Cong. Rec. 5738 (1934)). The House Judiciary Committee, however, eliminated the larceny and burglary subsections out of concern for the breadth of the measure, putting the bill in the form in which it was eventually passed. *See* 78 Cong. Rec. 8132-33 (1934) (House debate on and passage of S. 2841); H.R. Rep. 73-1598, at 1 (1934) (conference report recommending that "the Senate recede from its disagreement to the amendments of the House"). As Representative Hatton Sumners of Texas explained in debate, "we are going rather far in this bill, since all the property is owned, as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further. . . . " 78 Cong. Rec. 8133 (1934). The House of Representatives' emphasis on a narrow act, limited to bank robbery, supports the conclusion that this offense,

like its common law analogue, includes an intent element. If the act had eliminated the specific intent element, thereby broadening bank robbery beyond the familiar state law definition of robbery, it would have swept a broader range of conduct within its grasp.

The jurisdictional provision of the 1934 act sheds further light on Congress' intent in enacting the bank robbery prohibition. According to the act, "[j]urisdiction over any offense defined in this Act shall not be reserved exclusively to courts of the United States." Act of May 18, 1934, ch. 304, § 4, 48 Stat. 793. In other words, state courts – the courts that had long been presiding over common law and state statutory robbery trials – could try federal bank robbery cases.[18] This jurisdictional provision, presented in the bill from its inception, manifested Congress' intent to frame a criminal measure that would assist – not displace – local law enforcement efforts. This intent only to assist the states is furthered by a construction of bank robbery that incorporates, rather than rejects, the long-standing intent element of common law robbery. *See Jerome*, 318 U.S. at 105 ("[W]here Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute."); *In re Lewis*, 83 F. 159, 160-62 (D. Wash. 1897) (ordering release of United States Treasury Department

---

[18] As the House Report on the bill explained, after noting the jurisdictional provision, [t]here is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals. H.R. Rep. No. 73-1461, at 2 (1934).

agents held on state law robbery charges based on their execution of a faulty warrant because "the felonious intent necessary to make robbers of them [was] entirely lacking"); *State v. Morris*, 122 S.E. 914, 917 (W. Va. 1924) ("Robbery is an aggravated form of larceny, and the intent to steal the property at the time it is first taken is just as essential to the crime of robbery as the use of force in the taking."); *State v. Culpepper*, 238 S.W. 801, 803 (Mo. 1922) ("If McGrath owed Culpepper $175 for commissions on the Todd and Robinson deals, or if Culpepper believed he owed him that sum, then the defendant was not guilty of robbery, because the animus furandi, the felonious intent, was wanting.").

B. The 1937 Act, Like the 1934 Act, Uses Common Law Language.

In 1937, Congress amended the 1934 measure to criminalize bank larceny and unlawful entry of a bank, while leaving the definition of bank robbery the same. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (adding larceny and unlawful entry offenses). The new bank larceny provision, like the existing bank robbery provision to which it was added, used the language of the common law:

> [W]hoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other

> thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Id. at 749.[19] The similarity to the common law definition of larceny is plain. *See* 4 William Blackstone, *Commentaries* *230 (defining larceny as "the felonious taking, and carrying away, of the personal goods of another"). And, just as was the case at common law, this bank larceny definition included penalty gradations to distinguish petit from grand larceny. *See id.* at *229 (petit and grand larceny "are considerably distinguished in their punishment, but not otherwise"). Finally, the title of the 1937 act, "AN ACT To amend the bank-robbery statute to include burglary and larceny," expressly adopts the nomenclature of common law crimes. This usage in the act's title provides further support for the conclusion that Congress intended bank larceny to be a lesser included offense of bank robbery. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (" 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

The 1937 amendment, like the anti-robbery statute before it, was prompted by a request of the Attorney General. According to the Attorney General,

---

[19] The text of the bank larceny and unlawful entry provisions as they stood before they were recodified, from 12 U.S.C. § 588b to 18 U.S.C. § 2113, is provided in the statutory appendix. 4a-5a

> [t]he fact that the [1934] statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear – necessary elements of the crime of robbery – and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

H.R. Rep. 75-732, at 1-2 (1937) (reprinting letter from Attorney General); *see also* S. Rep. 75-1259, at 1-2 (1937) (reprinting same letter). The facts the Attorney General summarized clearly constitute common law larceny, but not robbery. The purpose of the bill was thus to create, among other things, the lesser included offense of bank larceny. *See Prince v. United States*, 352 U.S. 322, 327 (1957) ("The only factor stressed by the Attorney General in his [1937] letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. *It was manifestly the purpose of Congress to establish lesser offenses.*") (emphasis added).

C. The 1948 Recodification Retained the Specific Intent to Steal as an Element of Both Larceny and Robbery.

As this Court has observed, "[t]he 1948 Revision was not intended to create new crimes but to recodify those

then in existence." *Morissette v. United States*, 342 U.S. 246, 270 n.28 (1952). The bank robbery and bank larceny provisions were recodified as subsections (a) and (b), respectively, of 18 U.S.C. § 2113, in substantially the same terms they have today. Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, 796-97 (1948).

The textual change of note for the present case is the deletion of the modifier "feloniously" from the bank robbery provision. *Compare* 12 U.S.C. 558b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another . . . ") *with* 18 U.S.C. § 2113(a) (1948) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . "). As was noted above, the phrase "feloniously takes" is the common law term signifying the element of criminal intent to steal. However, it is clear for at least three reasons that Congress did not intend to eliminate the specific intent element of bank robbery by dropping the modifier "feloniously" from the 1948 recodification.

First, the legislative history of the 1948 recodification indicates that Congress did not eliminate the intent to steal element from the bank robbery provision. According to the comprehensive House Judiciary Committee report that accompanied the 1948 recodification, the only significant change in section 2113 was to the unlawful entry provision of subsection (a). *See* House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947). This change – replacing the phrase "any felony or larceny" with "any felony affecting such bank and in violation of any statute of the United States,

or any larceny" – was made in order to conform the definition of the unlawful entry offense to this Court's holding in *Jerome v. United States*, 318 U.S. 101 (1943).[20] *See* H.R. Rep. No. 80-304, at A135 ("Change conforms with *Jerome*."). Other changes to the recodified provisions, such as the deletion of "feloniously" from the robbery provision, were described merely as "changes in phraseology." *Id.* The deletion of "feloniously" from section 2113 is also attributable to one of the general goals of the 1948 recodification: namely, eliminating unnecessary felony classifications. As the Seventh Circuit explained in *United States v. Richardson*,

> Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words "felony" and "misdemeanor" and the unnecessary use of the words "and on conviction thereof" where they preceded "shall be punished." Most references to "felony" and "misdemeanor" were considered redundant because § 1 of Title 18 [now repealed] defined them for purpose of the entire code.

687 F.2d 952, 957 (7th Cir. 1982) (internal citation omitted).

Second, this Court long ago rejected the contrary conclusion when interpreting another federal theft crime

---

[20] In *Jerome v. United States*, this Court held that the unlawful entry offense set forth in 12 U.S.C. § 588b(a), the predecessor to 18 U.S.C. § 2113(a), "exclude[d] state felonies and . . . include[d] only those federal felonies which affect[ed] the banks protected by the Act." 318 U.S. 101, 108 (1943) (footnote omitted).

in *Morissette*. *Morissette*, like the case at bar, involved a statute where the expressed intent element was dropped from the text as part of the 1948 recodification. *See Morissette*, 342 U.S. at 266 n.28 (reviewing legislative history of 18 U.S.C. § 641 and its antecedents). As was explained above, *supra* at 17-20, this Court held in *Morissette* that the intent element nevertheless remained part of the definition of the theft crime at issue, holding that Congress must do more than fail to mention an intent element in the definition of a crime if it wishes to delete that element from the federal version of a common law crime. *See* 342 U.S. at 263 ("In such case, absence of contrary direction [from Congress] may be taken as satisfaction with widely accepted definitions, not as a departure from them.").[21] By parity of reasoning, the deletion of the common law criminal intent term "feloniously" from the statute at issue here cannot, by itself, be construed as an elimination of the intent element from the antecedent bank robbery statute.

Third, Congress' 1948 deletion of "feloniously" cannot reasonably be construed as somehow transforming the specific intent to steal element in the definition of bank robbery into a broader general intent requirement

---

[21] In *United States v. Mosley*, the Third Circuit erred by turning the presumption articulated by *Morissette* on its head, reasoning that Congress should have expressed its desire to *preserve*, rather than *eliminate*, the element of criminal intent from the bank robbery statute. *See* 126 F.3d 200, 205 (3d Cir. 1997) ("Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime."), *cert. dismissed*, 525 U.S. 120 (1998).

whereby the prosecution need only prove that the defendant's acts were not compelled or mistaken. This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), forecloses that conclusion. In *Prince*, the Court rejected the government's contention that, under 18 U.S.C. § 2113, "unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation." *Id.* at 324. Mr. Prince, having been convicted of both unlawful entry and bank robbery, was sentenced to 20 years for robbery and 15 years for unlawful entry, to be served consecutively. *Id.* at 324. After analyzing the legislative history of section 2113, *id.* at 325-28, this Court concluded that the unlawful entry offense merges with the completed robbery. Critical to the Court's conclusion was the premise that both unlawful entry and robbery share the same criminal intent to steal:

> the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (footnote omitted; emphasis added). Thereafter, the Court adhered to this view of the statute in *Heflin v. United States*, 358 U.S. 415, 419 (1959) ("We ruled that entering with intent to steal, which is 'the heart of the crime,' 'merges into the completed crime if the robbery is consummated.' ") (quoting *Prince*), *overruled on other*

grounds, Peyton v. Rowe, 391 U.S. 54 (1968). Of course, the intent to steal at the "heart" of unlawful entry cannot merge into the offense of bank robbery unless bank robbery itself requires the intent to steal.[22]

In sum, the history of the bank robbery and bank larceny provisions, as well as this Court's interpretation of both the bank robbery provision and other federal theft statutes, demonstrates that the common law "intent to steal" element remains a feature of section 2113(a). Although the bank robbery provision may not appear to require proof of the specific intent to steal in those very words, Congress clearly incorporated a specific intent element in its definition of bank robbery by using common law terminology. Bank larceny, too, requires proof of

---

[22] The decision in *Bell v. United States*, 462 U.S. 356 (1983), does nothing to reduce the force of *Prince* in this case. In *Bell*, the Court held that the "take" element of bank larceny is satisfied by proof that the defendant took the property by false pretenses, a method of taking that was outside the scope of larceny at common law. 462 U.S. at 358-62. Importantly, the "take" element itself remained intact: as the Court emphasized, section 2113(b) "does not apply to a case of false pretenses in which there is not a taking and carrying away." *Id.* at 361.

There is, of course, nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense continues to hew to the common law definition for that offense. For example, this Court recently construed the Hobbs Act, 18 U.S.C. § 1951, in just this manner. *See Evans v. United States*, 504 U.S. 255, 263-64 (1992) ("Although the present statutory text is much broader than the common law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (footnote omitted).

this same specific intent to steal. The textual elements of bank larceny are therefore a subset of the elements of bank robbery, making bank larceny a lesser included offense of bank robbery. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989).

IV. Bank Larceny is not Distinguished From Bank Robbery by Separate "Carries Away" or Valuation Elements.

Respondent contends that "bank larceny has three textual elements that are omitted from the bank robbery offense: (1) an intent to steal; (2) a 'carries away' actus reus element; and (3) a requirement that the property taken have a monetary value." Brief for United States Regarding Certiorari at 6. As has been shown above, both bank robbery and bank larceny require proof of the specific intent to steal. The other purported differences on which Respondent relies are equally illusory. When the bank robbery and bank larceny provisions are interpreted, as they must be, in light of the common law, the seeming elements of "carries away" and "monetary value" vanish.

A. Both Bank Robbery and Bank Larceny Require That the Property be Carried Away.

Respondent contends that the purported difference between the "takes" element of bank robbery and the "takes and carries away" element of bank larceny prevents the latter from being a lesser included offense of the former. This argument is flawed, however, because it fails to take proper account of the common law. Indeed, this

textual difference between the bank robbery and bank larceny provisions hews to the language of the common law and thus provides further support for Petitioner, not Respondent.

First, the "carries away" portion of the bank larceny statute is firmly rooted in the common law's "asportation" requirement. *See* 4 William Blackstone, *Commentaries* *231 ("There must not only be a taking, but a *carrying away*: *cepit et asportavit* was the old law-latin."). Congress thus used common law language – and, it must be presumed, common law meaning – to define bank larceny. *See, e.g., Neder*, 119 S. Ct. at 1839-41.

Second, at common law, robbery plainly shared larceny's asportation requirement. *See* 4 William Blackstone, *Commentaries* *240-41 ("*compound* larciny is such as has all the properties of the former, but is accompanied with one of, or both, the aggravations of a taking from one's *house* or *person*"; "Open and violent larciny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear."). At the same time, however, robbery was often defined in simple and "undetailed language" that made *no* mention of asportation. *Id.*; 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986). The use of undetailed language is thus nothing more than an adoption of the shorthand of common law sources. As LaFave & Scott observes, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common law robbery." *Id.* In short, the failure to

mention the asportation requirement when defining robbery does not indicate its absence.

In light of the foregoing considerations, the only fair conclusion to reach is that, by omitting the phrase "carries away" from the definition of bank robbery, Congress simply followed common law usage and thus tacitly included the asportation requirement as an element of the offense. Put another way, section 2113(a) simply exhibits the "undetailed language" of American robbery statutes that is described by LaFave & Scott. The apparent "carries away" textual difference between bank larceny and bank robbery, which vanishes when viewed through the lense of common law understanding, provides Respondent no support.

B. Bank Larceny has Separate Grades, but Does Not Contain a Separate Valuation Element.

Respondent contends that bank larceny, unlike bank robbery, requires proof of a monetary value for the stolen property. From this Respondent concludes that bank larceny requires proof of a separate element not found in the definition of bank robbery, and therefore cannot be a lesser included offense of bank robbery. Again, Respondent utterly ignores the common law terminology at work in the statute.

As was noted above, *supra* at 17, at common law simple larceny comprised two grades, grand larceny – "when it is the stealing of goods above the value of twelvepence" – and petit larceny – "when of goods to that value, or under." 4 William Blackstone, *Commentaries* *229. Importantly, these two grades of simple larceny

were "considerably distinguished in their punishment, *but not otherwise.*" *Id.* (emphasis added). Moreover, the value of the goods taken was not considered an element of larceny, nor did the distinction between petit and grand larceny prevent larceny from being considered a lesser included offense of robbery. *Id.* at *230-36 (discussing elements of larceny), *241 (defining robbery as "open and violent larciny from the *person*"). In modern parlance, the value of the money stolen was a sentencing factor, not an element of the offense.

In this respect, as in virtually every other, the definition of bank larceny hews to the common law. Section 2113(b) prescribes two degrees of punishment for larceny in two separate paragraphs, the severity of the punishment depending upon the value of the property taken from the bank. Specifically, where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), ¶ 1 *with* 18 U.S.C. § 2113(b), ¶ 2. As the Reviser's Notes to the 1948 recodification explain, "the provisions of subsection (b) measur[e] the punishment by the amount involved." House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947). In other words, just as at common law, the $1,000 threshold serves "as the dividing line between petit larceny and grand larceny." *Id.*; *see also* Economic Espionage Act of 1996, Pub. L. No. 104-294, § 606(a), 110 Stat. 3488, 3511 (raising threshold from $100 to $1,000).

Accordingly, in a bank larceny prosecution, the sole function served by proof of the precise monetary value of the stolen property (as opposed to proof that the property

has some value greater than $0) is to distinguish between the two levels of punishment provided in section 2113(b). With respect, however, to the basic theft element – that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are *identical*. *See* 18 U.S.C. § 2113(a), (b). It could thus scarcely be more plain that the differing degrees of punishment for bank larceny do not constitute a separate element that distinguishes bank larceny from bank robbery.[23]

This conclusion is further bolstered by the basic structure of section 2113, which separates different offenses that contain additional statutory elements into different lettered paragraphs, *see* 18 U.S.C. § 2113(d) (adding "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device"), § 2113(c) (adding "kills any person, or forces any person to accompany him without the consent of such person"), rather than lumping them together in a single lettered paragraph. On this model, if grand larceny contained an additional statutory element when compared to petit larceny, it would be set out in a separate lettered paragraph.

Finally, the conclusion that the amount of money taken in a bank larceny is a sentencing factor, rather than an element of bank larceny, not only follows the common

---

[23] It is worth noting that the Third Circuit expressly rejected the notion that the different grades of bank larceny define an element distinguishing the offense from bank robbery. *See United States v. Mosley*, 126 F.3d 200, 204 n.2 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998).

law definitions of larceny and robbery and the structure of the statute, it also fully comports with this Court's decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 119 S. Ct. 1215 (1999). Both cases rejected the notion that the analysis turns merely on whether the feature in question is recited in the provision that defines the crime. *See Almendarez-Torres*, 523 U.S. at 228 (looking "to the statute's language, structure, subject matter, context, and history"); *Jones*, 119 S. Ct. at 1220 (looking beyond "text alone" to the "traditional treatment of certain categories of important facts"). In both cases, the key to determining whether a feature of a federal criminal law was an element of the crime or a sentencing factor was how that feature was traditionally treated. In *Almendarez-Torres*, the feature in question was recidivism, and, because recidivism "is as typical a sentencing factor as one might imagine," 523 U.S. at 230, it was held to be a sentencing factor rather than an element of the crime. Similarly, in *Jones*, the feature in question was the infliction of serious bodily injury, and, because serious bodily injury "has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery," 119 S. Ct. at 1220, it was held to be an element of the crime rather than a sentencing factor.

Consistent with the reasoning of *Almendarez-Torres* and *Jones*, the $1,000 dividing line between the two paragraphs of section 2113(b) is a sentencing factor, not a separate element of the offense. It cannot reasonably be disputed that, at common law, the amount of money that was taken in a larceny went to the sentence imposed. It was not viewed as an element of the crime. *See* 4 William

Blackstone, *Commentaries* at *230-36. In other words, Mr. Blackstone's "twelvepence" has become Congress' "$1,000." *Id.* at *229. As a result, it is appropriate to conclude that Congress intended the amount of loss in a bank larceny prosecution to be treated as a sentencing factor rather than as an element of the crime. *See also* 18 U.S.C. § 661 (1994) (proscribing larceny in "the special maritime and territorial jurisdiction of the United States" and providing two grades of punishment); *United States v. Belt*, 516 F.2d 873, 875 (8th Cir. 1975) ("The element of value in [18 U.S.C. § 661] establishes the degree of the larceny committed for purposes of prescribing punishment; it is not an essential element of the offense.").

Furthermore, the United States Sentencing Commission has made the amount of loss resulting from an offense the preeminent factor in establishing a defendant's punishment for theft offenses. *See United States Sentencing Guidelines Manual* § 2B1.1(b)(1999) (increasing the base offense level in twenty increments based upon the amount of loss.). The amount of loss in a federal theft offense is, like recidivism, about "as typical a sentencing factor as one might imagine." *See Almendarez-Torres*, 523 U.S. at 230.

CONCLUSION

For the foregoing reasons, Mr. Carter respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
FEDERAL PUBLIC DEFENDER
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner
Floyd J. Carter

**Counsel of Record*

STATUTORY APPENDIX

Statutory Provisions Involved

I. Present-Day Statute

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny –

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of

value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under

the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" mean –

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

18 U.S.C. § 2113 (1994 & Supp. III).

II. Pre-1948 Recodification Statute

§ 588b. Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods.

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than

$10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

12 U.S.C. § 588(b) (1940).

III. 1948 Provision On Classification Of Offenses

§ 1. Offenses Classified.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 U.S.C. § 1 (Supp. V 1947-52).

Mar 9 2000

Supreme Court, U.S.
FILED
MAR 9 - 2000

No. 99-5716

In the Supreme Court of the United States

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

61 pp

QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b) (Supp. IV 1998), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Summary of argument	5
Argument	9
I. Bank larceny is not a lesser included offense of bank robbery	9
A. Bank larceny contains statutory elements that bank robbery does not have	10
1. Bank larceny, unlike bank robbery, requires proof of a specific intent to steal	12
2. Bank larceny, unlike bank robbery, requires proof that the defendant "carries away" the property	23
3. Bank larceny, unlike bank robbery, requires proof that the property has a monetary value	25
B. The legislative history of Section 2113 does not show congressional intent to make bank larceny a lesser included offense of bank robbery	29
C. Precedent and canons of statutory interpretation do not support petitioner's argument	36
II. Even if bank larceny is a lesser included offense of bank robbery under the statutory elements test, there was no error in the charge to the jury	43
Conclusion	47
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Albernaz v. *United States*, 450 U.S. 333 (1981) 37, 41
Ayres v. *Commonwealth*, 161 S.E. 888 (Va. 1932) 19
Bates v. *United States*, 522 U.S. 23 (1997) 6, 10, 24
Bell v. *United States*, 462 U.S. 356 (1983) 7, 31, 33, 34
Berra v. *United States*, 351 U.S. 131 (1956) 44
Cartwright v. *United States*, 146 F.2d 133 (5th Cir. 1944) 27
Chapman v. *United States*, 500 U.S. 453 (1991) 41-42
Coker v. *State*, 396 So. 2d 1094 (Ala. Crim. App. 1981) 28
Cox v. *Commonwealth*, 240 S.E.2d 524 (Va. 1978) 19
Factor v. *Laubenheimer*, 290 U.S. 276 (1933) 33
Government of the V.I. v. *Jarvis*, 653 F.2d 762 (3d Cir. 1981) 30
Haley v. *State*, 315 So. 2d 525 (Fla. Dist. Ct. App. 1975) 28
Harrison v. *United States*, 163 U.S. 140 (1896) 41
Heflin v. *United States*, 358 U.S. 415 (1959) 39
Holloway v. *United States*, 526 U.S. 1 (1999) 10, 16
Hopkins v. *Reeves*, 524 U.S. 88 (1998) 9
Jerome v. *United States*, 318 U.S. 101 (1943) 30, 31
Johnson v. *State*, 744 So. 2d 833 (Miss. Ct. App. 1999) 25
Jones v. *United States*, 526 U.S. 227 (1999) 26, 28
Keeble v. *United States*, 412 U.S. 205 (1973) 43
LeMasters v. *United States*, 378 F.2d 262 (9th Cir. 1967) 33
Litteral v. *State*, 634 P.2d 1226 (Nev. 1981) 18
Missouri v. *Hunter*, 459 U.S. 359 (1983) 37
Morissette v. *United States*, 342 U.S. 246 (1952) 7, 19-20, 39, 40, 41

Cases—Continued: Page

Moskal v. *United States*, 498 U.S. 103 (1990) 24, 29
Muscarello v. *United States*, 524 U.S. 125 (1998) 24, 41, 42
Neder v. *United States*, 527 U.S. 1 (1999) 7, 42, 43
Nell v. *State*, 642 P.2d 1361 (Alaska Ct. App. 1982) 18
Pennsylvania Dep't of Corrections v. *Yeskey*, 524 U.S. 206 (1998) 32
People v. *Moseley*, 566 P.2d 331 (Colo. 1977) 18
People v. *Myers*, 73 N.E.2d 288 (Ill. 1947) 28
People v. *Ocasio*, 697 N.Y.S.2d 368 (App. Div. 1999) 17
Prince v. *United States*, 352 U.S. 322 (1957) 7, 36, 37, 38
Railroad Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 32
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 24
Russello v. *United States*, 464 U.S. 16 (1983) 10
Sansone v. *United States*, 380 U.S. 343 (1965) 9, 43
Schmuck v. *United States*, 489 U.S. 705 (1989) 5, 7, 9, 44
Simpson v. *United States*, 435 U.S. 6 (1978) 38
Staples v. *United States*, 511 U.S. 600 (1994) 10, 19, 41
State v. *Ates*, 377 S.E.2d 98 (S.C. 1989) 28
State v. *Boucino*, 506 A.2d 125 (Conn. 1986) 28
State v. *Boyle*, 970 S.W.2d 835 (Mo. Ct. App. 1998) 25
State v. *Celaya*, 660 P.2d 849 (Ariz. 1983) 17
State v. *Combs*, 316 N.W.2d 880 (Iowa 1982) 28
State v. *Gore*, 722 N.E.2d 125 (Ohio Ct. App. 1999) 25
State v. *Johnson*, 558 N.W.2d 375 (Wis. 1997) 25
State v. *McGarrett*, 535 N.W.2d 765 (S.D. 1995) 28
State v. *Nix*, 922 S.W.2d 894 (Tenn. Crim. App. 1995) 17
State v. *Payne*, 540 So. 2d 520 (La. Ct. App. 1989) 18
State v. *Redding*, 331 N.W.2d 811 (Neb. 1983) 28

Cases—Continued: Page

State v. *Thompson*, 558 P.2d 1079 (Kan. 1976) 18
State v. *Valdez*, 977 P.2d 242 (Kan. 1999) 25
Stevens v. *United States*, 297 F.2d 664 (10th Cir. 1961) 27
Stevenson v. *United States*, 162 U.S. 313 (1896) 43
Traxler v. *State*, 251 P.2d 815 (Okla. Crim. App. 1953) 18
United States v. *Arambasich*, 597 F.2d 609 (7th Cir. 1979) 15
United States v. *Bailey*, 444 U.S. 394 (1980) 12, 19, 20
United States v. *Baker*, 985 F.2d 1248 (4th Cir. 1993), cert. denied, 510 U.S. 1040 (1994) 43-44
United States v. *Belt*, 516 F.2d 873 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976) 30
United States v. *Cornillie*, 92 F.3d 1108 (11th Cir. 1996) 46
United States v. *DeLeo*, 422 F.2d 487 (1st Cir.), cert. denied, 397 U.S. 1037 (1970) 14, 20, 22, 41
United States v. *DiGilio*, 538 F.2d 972 (3d. Cir. 1976), cert. denied, 429 U.S. 1038 (1977) 27
United States v. *Emery*, 682 F.2d 493 (5th Cir.), cert. denied, 459 U.S. 1044 (1982) 20
United States v. *Fazzini*, 871 F.2d 635 (7th Cir.), cert. denied, 493 U.S. 982 (1989) 20
United States v. *Gaddis*, 424 U.S. 544 (1976) 38
United States v. *Gonyea*, 140 F.3d 649 (6th Cir. 1998) 20
United States v. *Hoke*, 610 F.2d 678 (9th Cir. 1980) 26
United States v. *Johnson*, 575 F.2d 678 (8th Cir. 1978) 33
United States v. *Johnston*, 543 F.2d 55 (8th Cir. 1976) 20
United States v. *Lajoie*, 942 F.2d 699 (10th Cir.), cert. denied, 502 U.S. 919 (1991) 46

Cases—Continued: Page

United States v. *Lanier*, 520 U.S. 259 (1997) 35
United States v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981) 22
United States v. *Mann*, 119 F. Supp. 406 (D.D.C. 1954) 21
United States v. *Moore*, 73 F.3d 666 (6th Cir.), cert. denied, 517 U.S. 1228 (1996) 23
United States v. *Mosley*, 126 F.3d 200 (3d Cir. 1997), cert. granted, 523 U.S. 1019, cert. dismissed, 525 U.S. 120 (1998) 4
United States v. *Payne*, 805 F.2d 1062 (D.C. Cir. 1986) 44
United States v. *Perry*, 991 F.2d 304 (1993) 46
United States v. *Pick*, 724 F.2d 297 (2d Cir. 1983) 14
United States v. *Sandles*, 80 F.3d 1145 (7th Cir. 1996) 46
United States v. *Shabani*, 513 U.S. 10 (1994) 16
United States v. *Smith*, 638 F.2d 131 (9th Cir. 1981) 20
United States v. *Turkette*, 452 U.S. 576 (1981) 10
United States v. *Turley*, 352 U.S. 407 (1957) 29, 33
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 19, 20
United States v. *Walker*, 75 F.3d 178 (4th Cir.), cert. denied, 517 U.S. 1250 (1996) 46
United States v. *Warledo*, 557 F.2d 721 (10th Cir. 1977) 15
United States v. *Wells*, 519 U.S. 482 (1997) 10, 35
United States v. *Wilson*, 284 F.2d 407 (4th Cir. 1960) 27
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 19
Wilson, Ex parte, 114 U.S. 417 (1885) 27

Constitution, statutes, and rules: Page

U.S. Const. Amend. V 26
Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144 35
Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972 30
Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783 31
Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 31
Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420 15
Act of June 25, 1948, ch. 645, 62 Stat. 683 ..... 15, 32
Anti-Racketeering (Hobbs) Act, 18 U.S.C. 1951 ..... 6, 15
Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027 34
Rev. Stat. § 5209 (1875 ed.) 30
15 U.S.C. 1984 9
15 U.S.C. 1998c(a) 9
18 U.S.C. 1 (1982) 34, 35
18 U.S.C. 550 35
18 U.S.C. 641 ..... 20, 27, 39
18 U.S.C. 751(a) 19, 35
18 U.S.C. 1014 10
18 U.S.C. 1341 ..... 9, 14, 42
18 U.S.C. 1343 42
18 U.S.C. 1344 42
18 U.S.C. 1661 16
18 U.S.C. 1951 ..... 6, 35
18 U.S.C. 2076 35
18 U.S.C. 2111 ..... 6, 15, 16, 24, 35
18 U.S.C. 2112 16
18 U.S.C. 2113 (1994 & Supp. IV 1998) ..... *passim*
18 U.S.C. 2113(a) ..... *passim*
18 U.S.C. 2113(b) (Supp. IV 1998) ..... *passim*
18 U.S.C. 2113(c) 11, 14, 38, 39
18 U.S.C. 2113(d) 11, 22
18 U.S.C. 2113(e) 11
18 U.S.C. 2114 16
18 U.S.C. 2118 ..... 16, 24

Statutes and rules—Continued: Page

18 U.S.C. 2118(a) 6, 15
18 U.S.C. 2119 (Supp. IV 1998) 6, 15, 16, 23
18 U.S.C. 3559(a) 26
20 U.S.C. 1097(a) 10
21 U.S.C. 846 17
26 U.S.C. 5861(d) 19
26 U.S.C. 7201 9
26 U.S.C. 7207 9
Ala. Code § 13A-8-43 (1994) 17
Ark. Code Ann. § 5-12-102 (Michie 1997) 17
Conn. Gen. Stat. Ann. § 53a-133 (West 1994) 17
N.H. Rev. Stat. Ann. § 636:1 (1996) 17
Ohio Rev. Code Ann. § 2911.01(A)(1) (Anderson 1999) 25
Va. Code Ann. § 18.2-58 (Michie 1996) 19
Fed. R. Crim. P.:
Rule 7(a) 27
Rule 20 2
Rule 29 ..... 3, 5, 44
Rule 31(c) 8, 9, 43

Miscellaneous:

Black's Law Dictionary 194 (6th ed. 1986) 24
4 W. Blackstone, *Commentaries* 29
2 W. Burdick, *The Law of Crime* (1946) 29
143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) 16
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) 32, 33, 34, 35
H.R. Rep. No. 732, 75th Cong., 1st Sess. (1937) 31
H.R. Rep. No. 851, 102d Cong., 2d Sess. (1992) 16
W. LaFave & J. Israel, *Criminal Procedure* (1985) 27
1 W. LaFave & A. Scott, *Substantive Criminal Law* (1986 & Supp. 1999) 12, 13, 20
2 W. LaFave & A. Scott, *Substantive Criminal Law* (1986 & Supp. 1999) 22, 25, 30, 33
R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1982) 22, 23, 24-25, 27, 30

Miscellaneous—Continued: Page

S. 2841, 73d Cong., 2d Sess. (1934) 31
1 L. Sand et al., *Modern Federal Jury Instructions* (1999) 43
3 L. Sand et al., *Modern Federal Jury Instructions* (1999) 13
U.S. Sentencing Guidelines Manual (1998) 39
Webster's Third New International Dictionary (1986) 23, 24

In the Supreme Court of the United States

No. 99-5716

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 80-87) is unpublished, but the judgment is noted at 185 F.3d 863 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999. The petition for a writ of certiorari was filed on August 12, 1999, and granted on December 13, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of bank robbery, in violation of

18 U.S.C. 2113(a). He was sentenced to 215 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed. J.A. 80-87.[1]

1. On September 9, 1997, at approximately 2:00 p.m., petitioner entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, through the door adjacent to the parking lot. Despite the warm weather, he was wearing several layers of clothing and a ski mask that covered almost his entire face. Encountering a customer who was leaving the bank, he pushed her twice, and ordered her to "move over." C.A. App. 31. She "attempted to exit around [petitioner], but [he] pushed her back inside." J.A. 81. The customer "was so terrified that she screamed, startling others within the bank." J.A. 82; see also C.A. App. 29-32.

Petitioner then ran toward the customer service counter and vaulted over the counter and through one of the teller windows to the area behind the counter. One of the tellers ran to the branch manager's office, "yelling that a robber was after her." J.A. 82. Petitioner seized money from a teller drawer and stuffed it into a brown paper bag. He then moved to within two feet of where two tellers stood and emptied their teller drawers. *Ibid.* According to one of the tellers, he said he "wouldn't hurt nobody." C.A. App. 79. Nevertheless, two of the tellers testified that they were "scared to death," and one was crying and trembling. Gov't

[1] Petitioner previously had pleaded guilty to an indictment charging three counts of bank larceny, in violation of 28 U.S.C. 2113(b) (Supp. IV 1998), in the United States District Court for the Eastern District of Pennsylvania. The case was transferred, pursuant to Federal Rule of Criminal Procedure 20, to the District of New Jersey for sentencing. He was sentenced on those convictions to a concurrent term of 120 months' imprisonment. J.A. 64-70.

C.A. Br. 3. The customer whom petitioner had pushed inside the bank upon his arrival meanwhile had run out of the bank, "got into her car, laid down on the floor and prayed until the authorities arrived." J.A. 82. After removing almost $16,000 in currency, petitioner hurdled back over the teller counter and warned the bank's occupants not to follow him. Police arrested him shortly thereafter. During a subsequent interview, petitioner confessed that he had taken money from the bank. *Ibid.*

Petitioner's defense was that he committed only bank larceny, not bank robbery. He sought to show through his own testimony and cross-examination of the government's witnesses that he did not use intimidation to obtain the bank's money. He challenged the customer's testimony that she had screamed upon encountering petitioner and that he twice had pushed her. C.A. App. 157-158. According to his account, he wore the ski mask to conceal his identity and was under the mistaken belief that no customers were in the bank when he entered it. *Id.* at 155-156. He said that he specifically avoided confronting the tellers and first approached a vacant teller station because he did not want to scare the tellers. *Id.* at 159-160. He reassured the tellers that he was "not gonna hurt anybody" and just wanted the money. *Id.* at 161. Finally, after stealing the money, he told the occupants not to follow him because "I run fast." *Id.* at 164.

After the close of the government's case, petitioner moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. J.A. 17-20. That motion followed a written submission by defendant requesting that the jury be instructed on a charge of bank larceny as a lesser included offense of bank robbery. J.A. 4-9. The gravamen of both motions was the defense's theory that the government had not

proved that petitioner had obtained the bank's money through "force, violence or intimidation," as required by 18 U.S.C. 2113(a). J.A. 24. The court denied the motion, finding sufficient evidence to establish the elements of bank robbery. J.A. at 23-32. The court also discussed the Third Circuit's decision in *United States* v. *Mosley*, 126 F.3d 200 (1997), cert. granted, 523 U.S. 1019, cert. dismissed, 525 U.S. 120 (1998), which held, as a matter of law, that bank larceny is not a lesser-included offense of bank robbery. J.A. 29-32. Relying on *Mosley*, the court denied petitioner's request for a jury instruction on bank larceny, concluding that the government had introduced sufficient evidence that "the behavior of [petitioner] was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank robbery offense." J.A. 32.

The district court accordingly charged the jury that the elements of the offense of bank robbery are (1) that the defendant knowingly and willfully took money from or in the presence of employees of the bank; (2) that the money was in the "care, custody, control, management or possession" of the bank; (3) that the defendant took the money by means of "force, violence or intimidation"; and (4) that the money was insured by the Federal Deposit Insurance Corporation. J.A. 55. The court also instructed the jury that "[t]he defense theory of the case" was that "no conduct of the defendant was reasonably calculated to instill fear of bodily harm." J.A. 57.

2. The court of appeals affirmed. Following *Mosley*, the court held that petitioner was not entitled to a bank larceny instruction because bank larceny is not a lesser-included offense of bank robbery. It emphasized that its holding in *Mosley* was a legal one, resting "solely on the legal interpretation of Sections 2113(a) and (b)."

J.A. 84. It declined to reconsider its decision in *Mosley*, finding that specific intent, while an essential element of a violation of Section 2113(b), is not a requisite element of bank robbery. The court also rejected petitioner's claim that the evidence did not sufficiently establish that petitioner used force, violence, or intimidation to steal the money, which had been the basis of petitioner's motion for acquittal under Federal Rule of Criminal Procedure 29. J.A. 86-87.

SUMMARY OF ARGUMENT

I. Bank larceny is not a lesser included offense of bank robbery.

A. Under *Schmuck* v. *United States*, 489 U.S. 705 (1989), the resolution of the lesser included offense issue turns on whether all of the statutory elements of the putative lesser offense are necessarily established by proving the charged offense. Bank larceny contains elements not found in bank robbery. Section 2113(b) bank larceny requires the government to prove that the defendant (1) had the specific "intent to steal or purloin" the bank's property; (2) "carrie[d] away" that property; and (3) took property that had a monetary value. 18 U.S.C. 2113(b) (Supp. IV 1998). Section 2113(a) bank robbery contains none of those requirements. 18 U.S.C. 2113(a).

The omission of a specific intent requirement in the first paragraph of Section 2113(a) is significant. Congress provided specific intent elements in other subsections of Section 2113. For example, the bank burglary offense set forth in the second paragraph of Section 2113(a) requires an "intent to commit in such bank * * * any felony affecting such bank." The presumption is that the omission of a counterpart specific intent element for bank robbery was deliberate.

See *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). That conclusion is further supported by the absence of a specific intent to steal requirement in other robbery offenses defined in the criminal code, such as 18 U.S.C. 1951 (Hobbs Act), 18 U.S.C. 2111 (robbery in the special maritime and territorial jurisdiction of the United States), 18 U.S.C. 2118(a) (robbery of controlled substances), and 18 U.S.C. 2119 (Supp. IV 1998) (carjacking).

Although Section 2113(a) bank robbery does not contain an express mental element, it is appropriate to infer a general intent requirement. The courts of appeals have consistently held that the defendant must act "knowingly" with respect to each *actus reus* in Section 2113(a). The conclusion that the knowing use of "force and violence, or by intimidation" is a sufficient mental element accords with the purposes behind Congress's enactment of the bank robbery offense. Because of the threat posed to innocent persons in financial institutions, bank robbery causes as much social harm and is just as serious even if the perpetrator lacks a specific intent to deprive the bank permanently of its property.

For similar reasons, the omission of an asportation element and a monetary valuation requirement in Section 2113(a) bank robbery further supports the conclusion that Congress did not intend bank larceny in Section 2113(b) to be a lesser included offense of bank robbery.

B. The legislative history does not support petitioner's submission. Although simple larceny was a lesser included offense of robbery at common law, an examination of the language and background of Section 2113 refutes the contention that Congress intended merely to codify the common law robbery and larceny

offenses. Congress did not initially enact a bank larceny offense when it proscribed bank robbery in 1934. When it later added a crime for bank larceny, it did so to fill a gap in the statute—the failure to reach the theft of bank property without the use of force, violence, or intimidation. Congress did not indicate in 1937 that it intended bank larceny to be a lesser included offense of the bank robbery crime established in 1934. And as this Court has already recognized, the language of Section 2113 creates a larceny offense that is broader than the common law. See *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983). The same is true of the robbery offense defined in Section 2113.

C. Nor do this Court's cases and canons of statutory construction support petitioner's contention. In *Prince* v. *United States*, 352 U.S. 322 (1957), this Court held that convictions under paragraphs one and two of Section 2113(a) merge if the defendant actually completed the crime of bank robbery. That holding did not entail an analysis of the statutory elements of the offenses contained in Sections 2113(a) and (b), as is now required by *Schmuck*, *supra*. The holding in *Prince* may bar certain cumulative punishments under Section 2113 (a result achieved today by the Sentencing Guidelines), but it does not compel the giving of a lesser included offense instruction when the government charges only bank robbery (and not bank larceny) in the indictment.

Similarly, petitioner's reliance on *Morissette* v. *United States*, 342 U.S. 246 (1952), is misplaced. *Morissette* construed the theft offenses in 18 U.S.C. 641 to incorporate common law requirements. That conclusion does not carry over to Section 2113, which departs from the common law. Nor is petitioner assisted by *Neder* v. *United States*, 527 U.S. 1 (1999). That case

construed federal fraud statutes to incorporate the common law requirement of materiality. In contrast to Congress's undefined references to a "scheme to defraud" in those statutes, the bank robbery statute specifies its elements and now omits from its text an intent-to-steal element that was previously present (in the form of the word "feloniously"). It is one thing to hold that a simple reference to a common law crime carries with it the common law's elements; it is quite another to hold that Congress cannot escape the common law even when it enumerates the elements of a crime and deliberately omits some aspects of that crime's common law antecedents.

II. Even if, contrary to our submission, this Court were to hold that the statutory elements of Section 2113(b) create a lesser included offense of Section 2113(a) bank robbery, the district court correctly declined to give a lesser included offense instruction in this case. Federal Rule of Criminal Procedure 31(c) requires such an instruction only if the evidence would permit a rational jury to convict the defendant of the lesser offense while acquitting him of the greater one. The district court here properly concluded that the evidence admitted of only one conclusion: that petitioner obtained the bank's money by the use of intimidation. There is no evidence that petitioner obtained the funds as a result of the tellers' voluntary actions. Because no rational juror could reach the conclusion advanced by petitioner, a bank larceny instruction was not required.

ARGUMENT

I. BANK LARCENY IS NOT A LESSER INCLUDED OFFENSE OF BANK ROBBERY

Federal Rule of Criminal Procedure 31(c) provides that a "defendant may be found guilty of an offense necessarily included in the offense charged." In *Schmuck* v. *United States*, 489 U.S. 705 (1989), the Court held that, for purposes of instructing the jury, the test for determining whether one offense is a "necessarily included" offense of another under Rule 31(c) is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. See *Hopkins* v. *Reeves*, 524 U.S. 88, 96 & n.6 (1998).[2]

---

[2] Although petitioner acknowledges that *Schmuck* requires analysis of the textual elements of the putatively greater and lesser offenses, he maintains that *Schmuck* does not require "a mechanical literalism" of examining whether the words defining the elements in the two provisions are the same. Pet. Br. 10. Petitioner's approach, however, is inconsistent with how this Court analyzed textual elements in cases addressing whether one offense is necessarily included within another. See *Schmuck*, 489 U.S. at 721-722 ("[K]nowingly and willfully tampering with an odometer is not identical to devising or intending to devise a fraudulent scheme.") (comparing 18 U.S.C. 1341 with 15 U.S.C. 1984 and 1998c(a)); *Sansone* v. *United States*, 380 U.S. 343, 352-353 (1965) (analyzing elements of 26 U.S.C. 7207 and concluding that they are a subset of elements in 26 U.S.C. 7201).

A. Bank Larceny Contains Statutory Elements That Bank Robbery Does Not Have

"[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). Because Congress is solely responsible for defining federal crimes, see *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), this Court will "ordinarily resist reading words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (specific intent to defraud is not an element of the offense of misapplication of funds, 20 U.S.C. 1097(a)); see *United States* v. *Wells*, 519 U.S. 482, 490-493 (1997) (materiality is not an element of the offense of making a false statement to a federal bank, 18 U.S.C. 1014). That principle is especially apt here because bank robbery and bank larceny are defined in a single provision, thus highlighting the significance of Congress's choice of contrasting terminology. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates*, 522 U.S. at 29-30 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Section 2113 of Title 18 punishes crimes against banks in five subsections, the first two of which are bank robbery (18 U.S.C. 2113(a)) and bank larceny (18 U.S.C. 2113(b) (Supp. IV 1998)).[3] Bank larceny is not a

[3] Section 2113 punishes diverse crimes against banks. Section 2113(a) provides, in separate paragraphs, that bank robbery and entry into a bank with the intent to commit a felony therein are crimes punishable by up to 20 years' imprisonment. Section 2113(b) provides that bank larceny of property exceeding $1000 is a crime punishable by up to ten years' imprisonment. In a separate paragraph, Section 2113(b) states that bank larceny of property not exceeding $1000 is a crime punishable by a fine of up to $1000, imprisonment not to exceed one year, or both.

Section 2113(c) makes receipt of stolen bank property a crime and provides for the punishment set forth in Section 2113(b). 18 U.S.C. 2113(c). Section 2113(d) states that aggravated assault during a bank robbery or bank larceny is a crime and provides for up to 25 years' imprisonment. 18 U.S.C. 2113(d). Section 2113(e) provides that a homicide or kidnapping committed during the commission of a crime againrt a bank defined in this section is subject to a minimum of ten years' imprisonment for the kidnapping and life imprisonment for the homicide. 18 U.S.C. 2113(e).

lesser included offense of bank robbery because Section 2113(b) contains elements not present in Section 2113(a). Nothing in either subsection expresses an intent by Congress to create greater and lesser included offenses between the first paragraph of subsection (a) and subsection (b), as Congress explicitly did in subsections (d) (18 U.S.C. 2113(d)) and (e) (18 U.S.C. 2113(e)) for other offenses established in Section 2113.[4]

Section 2113(a) provides, in its first paragraph, that, "[w]hoever, by force and violence, or by intimidation,

[4] Section 2113(d), for example, is a greater offense of those created in subsections (a) and (b), because it provides that "[w]hoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be * * * imprisoned not more than twenty-five years." 18 U.S.C. 2113(d).

Similarly, Section 2113(e) expresses an unequivocal intent to create a greater offense by providing that, "[w]hoever, in committing any offense defined in this section, * * * kills any person, * * * shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment." 18 U.S.C. 2113(e).

takes, or attempts to take, * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association," is guilty of an offense that is punishable by up to twenty years in prison. 18 U.S.C. 2113(a). Section 2113(b), by contrast, provides that anyone who "takes *and carries away, with intent to steal or purloin,* any property or money or any other thing of value *exceeding $1,000* belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association," is guilty of an offense punishable by up to ten years in prison. 18 U.S.C. 2113(b) (Supp. IV 1998) (emphasis added). Section 2113(b) thus requires proof, as the italicized terms indicate, of three elements not present in Section 2113(a): (1) a specific intent to steal or purloin; (2) a requirement that the property be "carr[ied] away"; and (3) a provision that the property taken have a monetary value.

1. ***Bank larceny, unlike bank robbery, requires proof of a specific intent to steal***

a. While bank larceny contains an express "intent to steal or purloin" element, bank robbery has no such mental element in its text. The omission of that phrase is significant. Although the phrases "general intent" and "specific intent" have "been the source[s] of a good deal of confusion," *United States* v. *Bailey*, 444 U.S. 394, 403 (1980), "[t]he distinction between 'general intent' and 'specific intent' is not without importance in the criminal law," 1 W. LaFave & A. Scott, *Substantive Criminal Law* 315 (1986 & Supp. 1999).

> [T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but *in addition* it must be shown that there was an "intent to steal" the property.

1 W. LaFave & A. Scott, *supra*, at 315 (emphasis added). By including a specific intent requirement in Section 2113(b) but not in the first paragraph of Section 2113(a), Congress intended that a prosecution for bank larceny establish a "special mental element * * * above and beyond" the general mental state required for the *actus reus* of the crime. Congress's omission of the specific "intent to steal" from the first paragraph of Section 2113(a) also contrasts with its provision of a different specific intent element—the "intent to commit in such bank * * * any felony affecting such bank" in the second paragraph of Section 2113(a).[5] That aspect

---

[5] The second paragraph of Section 2113(a) is sometimes referred to as the bank burglary offense. The interrelationship between the bank burglary offense, which is not at issue in this case, and Section 2113(b) is not entirely clear. The second paragraph of Section 2113(a) makes it an offense to enter a bank "with intent to commit * * * any larceny." 18 U.S.C. 2113(a). As one commentator has noted:

> [D]espite the fact that section 2113(b) carries a lesser maximum penalty than section 2113(a), it does not seem that section 2113(b) is a lesser included offense of the second paragraph of section 2113(a) * * * . Consequently, when prosecutors are presented with crimes that would seem to be section 2113(b) violations, it appears that they can attempt to prosecute the defendant under the second paragraph of section 2113(a) with no limitations.

3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 53.01, at 53-4 (1999).

of Section 2113(a) strongly suggests that if Congress had intended to require proof of an "intent to steal" to establish bank robbery, it would have said so expressly. Indeed, one court of appeals has concluded that the omission of a specific intent element in the first paragraph of Section 2113(a) and the inclusion of specific intent elements in the second paragraph of Section 2113(a) and in Section 2113(b) "shows careful draftsmanship." *United States* v. *DeLeo*, 422 F.2d 487, 490 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).[6]

b. The omission of a specific intent requirement in the bank robbery offense in Section 2113(a) is consistent with robbery offenses defined elsewhere in the criminal code. Unlike larceny, which federal law has consistently defined to require proof of a specific intent permanently to deprive, robbery has not always been

[6] Petitioner is not assisted by his contention (Br. 11-14) that structural features of Section 2113 require deeming bank larceny to be a lesser included offense of bank robbery. First, petitioner notes (Br. 11-12) that Section 2113(c) creates a crime of receiving stolen property that expressly applies only to bank larceny. Petitioner argues that it would be unusual for Congress not to punish receipt of property after a robbery as well. The answer, however, is that in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c). See note 25, *infra*. In any event, nothing in Section 2113(c) purports to redefine the elements required under Section 2113(a).

Second, petitioner observes (Br. 13-14) that Section 2113(a) punishes, in its second paragraph, entering a bank with the intent to commit a federal felony affecting the bank "or any larceny." That provision does not imply that larceny is a lesser offense of robbery; rather, the unlawful-entry provision applies comprehensively to *all* federal felonies affecting the bank. See, *e.g.*, *United States* v. *Pick*, 724 F.2d 297 (2d Cir. 1983) (mail fraud under 18 U.S.C. 1341 also a predicate offense for unlawful bank entry offense of second paragraph 18 U.S.C. 2113(a)).

defined that way. In 1946, Congress amended the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, to punish certain extortion and robbery offenses. The 1946 amendment defined robbery as the "unlawful taking * * * of personal property, from the person * * * by means of actual or threatened force, or violence, or fear of injury." Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420. No specific intent element was provided. That definition was carried over to the present version of 18 U.S.C. 1951 during the 1948 codification. See Act of June 25, 1948, ch. 645, 62 Stat. 683.[7]

The absence of an express intent to steal element is characteristic of other federal robbery statutes, many of which merely define robbery as the forcible taking of the victim's property and omit any reference to a specific mental requirement. For example, Section 2111 criminalizes robbery in the special maritime and territorial jurisdiction of the United States, and does not contain an express specific intent to steal requirement. 18 U.S.C. 2111. The same is true of Section 2118(a), which Congress enacted in 1984 to criminalize robbery of controlled substances. 18 U.S.C. 2118(a). And Section 2119, which Congress enacted in 1992 to reach carjacking offenses, contains no explicit intent-to-steal element; rather, it requires proof of an "intent to cause death or serious bodily harm." 18 U.S.C. 2119

[7] Accordingly, courts have held that requests for specific intent instructions in Hobbs Act cases are properly denied, with the requisite intent being knowledge. See, *e.g.*, *United States* v. *Arambasich*, 597 F.2d 609, 614 (7th Cir. 1979) (specific intent instruction not required under Hobbs Act); *United States* v. *Warledo*, 557 F.2d 721, 729 n.3 (10th Cir. 1977) ("Under the clauses of Section 1951, proscribing the obstruction, delay, or attempt to obstruct commerce by robbery or extortion, a general intent to commit those crimes is required.").

(Supp. IV 1998).[8] In enacting Section 2119, Congress specifically tracked the language of Sections 2111, 2113, and 2118. See H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 17 (1992). In discussing the "with intent to cause death or serious bodily harm" element of the carjacking statute, Senator Leahy noted in 1997 that "knowingly" is the only mental element required for the usual robbery offense. See 143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) ("Robbery offenses typically require only what the carjacking statute formerly required by way of scienter, *i.e.*, that property be knowingly taken from the person or presence of another by force and violence or by intimidation.").

Like the omission of a specific intent element in Section 2113(a), the omission of an intent to steal from those other federal robbery statutes cannot be attributed to inadvertence.[9] While common law robbery was generally understood to contain a specific intent to steal element, see pp. 29-30, *infra*, "Congress' silence [in Section 2113(a)] speaks volumes * * * [and] Congress appears to have made the choice quite deliberately" in omitting any such requirement from Section 2113(a). *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (holding that absence of an overt act requirement from

---

[8] In *Holloway* v. *United States*, 526 U.S. 1 (1999), this Court held that proof of a person's conditional intent "to cause death or serious bodily harm" under 18 U.S.C. 2119 (Supp. IV 1998) satisfied that mental element.

[9] Other—usually older—statutes use the term "rob" or "robbery" without further elaboration. See, *e.g.*, 18 U.S.C. 2112 (robbery of personal property of United States); 18 U.S.C. 2114 (robbery of mail matter); 18 U.S.C. 1661 (robbery ashore). Those statutes, unlike Section 2113(a), retain the common law meaning of robbery. See p. 41, *infra*.

21 U.S.C. 846 was dispositive, notwithstanding that such proof was required for common law conspiracy).

c. State robbery statutes, like the various robbery offenses in Title 18, vary widely as to whether the specific intent to steal is an element of robbery. In most States, robbery has been defined by the state legislature as a greater offense of larceny (or theft) and thus to require proof of a specific intent to steal. See, *e.g.*, Ala. Code § 13A-8-43 (1994) (defining robbery as use of force "in the course of committing a theft," which under Section 13A-8-2 is defined as knowingly exerting control over property "with intent to deprive the owner of his property"); Ark. Code Ann. § 5-12-102 (Michie 1997) ("A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another."); Conn. Gen. Stat. Ann. § 53a-133 (West 1994) ("A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person."); N.H. Rev. Stat. Ann. § 636:1 (1996) (defining robbery as use or threat of physical force "in the course of committing a theft"). State courts construing such statutes have held that the government must prove that the defendant had a specific intent to deprive the victim of his property. See, *e.g.*, *People* v. *Ocasio*, 697 N.Y.S.2d 368, 369-370 (App. Div. 1999); *State* v. *Celaya*, 660 P.2d 849, 852-853 (Ariz. 1983) (in banc); *State* v. *Nix*, 922 S.W.2d 894. 901 (Tenn. Crim. App. 1995).

By contrast to those States that contain a specific mental element requirement in the statutory definition of robbery, a number of States do not provide for such a mental element in the statutory crime of robbery. In those States, the state courts uniformly have held that

the specific intent to steal should not be read into the robbery offense. See, *e.g.*, *State* v. *Payne*, 540 So. 2d 520, 523-524 (La. Ct. App. 1989) (holding that under new Louisiana statute "[a]rmed robbery is a general intent crime" for which the "criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal"); *Nell* v. *State*, 642 P.2d 1361, 1366 (Alaska Ct. App. 1982) ("We see no reason to add to the statute an intent to permanently deprive another of the property" because "the legislature, in passing this robbery statute, intended to emphasize the fact that robbery is a crime against the person and deemphasize the theft aspects of the offense."); *Litteral* v. *State*, 634 P.2d 1226, 1227 (Nev. 1981) (sustaining trial court's refusal to "instruct the jury that the defendant had to take the property with a specific intent to deprive the victim permanently of his property" because statutory definition of robbery did not require that element); *People* v. *Moseley*, 566 P.2d 331, 335 (Colo. 1977) (en banc) ("The statutory language contains no suggestion that robbery requires any specific intent to permanently deprive the owner of the use or benefit of the thing taken."); *State* v. *Thompson*, 558 P.2d 1079, 1086 (Kan. 1976) (noting that "the new statutes broadened the statutory crime of robbery to cover any taking of property from the person or presence of another by threat of bodily harm or by force [and] [t]he requirement of a specific intent to deprive the owner permanently of his property was eliminated"); *Traxler* v. *State*, 251 P.2d 815, 835 (Okla. Crim. App. 1953) (holding that state statute had changed common law definition of robbery by not including element that "the taking be with the felonious intent to take and

permanently deprive the owner").[10] Thus, although the practice in the States does not directly shed light on what Congress intended in the drafting history of bank robbery in 18 U.S.C. 2113(a), Congress's omission of a specific intent element in the federal bank robbery offense was not unusual in light of similar omissions (and specific inclusions) by state legislatures that have created robbery offenses in statutory law.

d. Although bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). There is a presumption that any federal criminal offense requires a mental element. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one. See *Staples*, *supra* (possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d)); *Bailey*, *supra* (escape, in violation of 18 U.S.C. 751(a)); *United States Gypsum Co.*, *supra* (Sherman Act); *Morissette* v.

---

[10] It appears to be quite rare for a State not to have codified the robbery offense. Virginia, for example, has never codified the elements of robbery, relying instead on the common law definition. See *Cox* v. *Commonwealth*, 240 S.E.2d 524 (Va. 1978); *Ayres* v. *Commonwealth*, 161 S.E. 888, 897 (Va. 1932) ("At common law robbery is defined as the taking, with intent to deprive the owner permanently, of personal property, from his person or in his presence, against his will, by violence or intimidation."); see also Va. Code Ann. § 18.2-58 (Michie 1996) (defining punishment for person who commits robbery).

United States, 342 U.S. 246 (1952) (theft, in violation of 18 U.S.C. 641).

In like fashion, the courts of appeals that have ruled that bank robbery is not a specific intent crime have nevertheless construed the statute to contain a "general intent" requirement. See, *e.g.*, *United States* v. *Gonyea*, 140 F.3d 649, 653-654 (6th Cir. 1998); *United States* v. *Fazzini*, 871 F.2d 635, 641 (7th Cir.), cert. denied, 493 U.S. 982 (1989); *United States* v. *Emery*, 682 F.2d 493, 497 (5th Cir.), cert. denied, 459 U.S. 1044 (1982); *United States* v. *Smith*, 638 F.2d 131, 132 (9th Cir. 1981); *United States* v. *Johnston*, 543 F.2d 55, 58 (8th Cir. 1976); *United States* v. *DeLeo*, *supra*.[11] Those cases have held that a defendant must be shown to have acted "knowingly" with respect to each *actus reus*, a view that is consistent with the notion that, when a person performs acts proscribed by Congress, criminal liability should be imposed regardless of whether that person desired or merely knew of the practical certainty of the results. See *Bailey*, 444 U.S. at 404; *United States Gypsum Co.*, 438 U.S. at 445; see generally 1 W. LaFave & A. Scott, *supra*, § 3.5.[12] Those

[11] Those courts were considering whether diminished capacity is a defense to bank robbery. Because "diminished capacity is a defense only to *specific* intent crimes," evidence of alcohol-induced unconsciousness and other forms of diminished capacity is irrelevant in a Section 2113(a) case because "completed armed bank robbery is a *general* intent crime." *Fazzini*, 871 F.2d at 641; see also *Smith*, 638 F.2d at 132.

[12] In this case, the indictment and the jury instructions establish that the jury found that petitioner committed his robberies with the requisite intent. The indictment alleged that petitioner acted "knowingly and willfully." J.A. 2. The jury was instructed that the intimidation element required proof that petitioner acted "knowingly and deliberately." J.A. 56. The jury was charged that the "knowingly" element was to ensure that no person would be convicted of an act done by mistake, accident, or other innocent reason. J.A. 55. The district court's ruling on petitioner's Rule 29 motion for acquittal further establishes that sufficient evidence existed of defendant's knowing use of intimidation to take the money from the bank. J.A. 23-32.

cases are also consistent with the decisions of state courts, which, in construing robbery statutes that lack a specific mental element, have held that robbery is a general intent crime requiring proof that the defendant knew he was using force to take property from the person of another. See pp. 18-19, *supra*.

e. Limiting the mental element of bank robbery to "knowingly" taking by force, violence, or intimidation, instead of an intent to steal, is appropriate in light of the character of that crime. "[T]he gist of [robbery] is a crime against the person." *United States* v. *Mann*, 119 F. Supp. 406, 407 (D.D.C. 1954). Without regard to the robber's intent to steal, the robbery offense warrants sanction because of the fear it instills in the victims and the risk that they will suffer harm, be it physical or emotional. Bank robberies often occur when employees and customers are in the bank, and robbers often carry and use firearms to gain an advantage over the people inside. After a robbery or attempted robbery, the bank may have to interrupt its business to attend to the needs of the victims, to cooperate with authorities, and to reassure its customers. For those reasons, the bank robbery offense defined in Section 2113(a) punishes the attempt to rob as well as the completed act.

Because the use of force, violence, and intimidation causes social harms regardless of whether the robber has a specific intent to dispossess the bank of its property permanently, it is logical to construe the first paragraph of Section 2113(a) as not requiring a specific

intent to steal. The bank robbery statute "describe[s] acts which, when performed, are so unambiguously dangerous to others that the requisite mental element is necessarily implicit in the description." *DeLeo*, 422 F.2d at 491. "It therefore is immaterial for sections 2113(a) and (d) whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit; the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *Ibid.*[13]

Larceny, on the other hand, is a crime principally committed against property, see R. Perkins & R. Boyce, *Criminal Law* 343-344 (3d ed. 1982), and the specific intent requirement has always been a critical element of that offense: there is no larceny without an intent to deprive the owner permanently of the property taken. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.5 (1986 & Supp. 1999). The same cannot be said of bank robbery in violation of Section

[13] Undoubtedly, most bank robbers will intend to deprive the bank permanently of its property, but that will not invariably be the case. One reported court of appeals' decision records that a man robbed a bank solely to be apprehended and returned to prison so he could be treated for his alcohol problem. See *United States* v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981). We are informed by the FBI that indictments are brought as often as every year against former incarcerees who commit bank robbery with the intent not of taking the money but of being returned to prison because of their inability to cope with life in free society. Because those cases invariably result in guilty pleas, they do not result in reported decisions. The same is true in the less frequent instance of bank robbers who rob banks primarily to disrupt the bank's business with violence. Terrorists, for example, may well be indifferent to the fate of the bank's property. Those sorts of robberies nevertheless come within the coverage of Section 2113(a).

2113(a). Congress's decision to distinguish the offenses in Section 2113 thus is a reasonable basis for a judgment that the two crimes are different in nature and that the bank larceny offense is not simply a lesser degree of bank robbery.[14]

2. *Bank larceny, unlike bank robbery, requires proof that the defendant "carries away" the property*

The Section 2113(a) and (b) offenses also have different *actus reus* requirements. Both offenses use the word "take[]" to describe the *actus reus* of the crime. That word is defined as "[t]o get into one's hands or into one's possession, power, or control by force or stratagem." *Webster's Third New International Dictionary* 2329 (1986); cf. *United States* v. *Moore*, 73 F.3d 666, 668-669 (6th Cir.) (using that definition to define "take" in the carjacking statute, 18 U.S.C. 2119 (Supp. IV 1998),

[14] Petitioner suggests that the "intent to steal or purloin" element from Section 2113(b) may be inferred in Section 2113(a) from the words "takes . . . *from* the person of another" (emphasis added) since the definition of steal is "to take the property *of* another." Pet. Br. 11 (emphasis added). That imprecise reading of the statute, however, would lead to incongruous results. A robber may forcefully take property *from* another person believing himself to be the rightful owner, intending to return it, or seeking to have himself apprehended so that he can be re-incarcerated. Such wrongful behavior would not be stealing, since there would be no intent to deprive permanently the owner of the property. Ironically, although throughout his brief petitioner advocates incorporation of common-law elements in the bank robbery statute notwithstanding their explicit omission, petitioner asks this Court to expand the statutory definition of "takes"—one of the few common-law words adopted by Congress in defining the Section 2113(a) offense—well beyond its common law meaning of obtaining possession of property. See R. Perkins & R. Boyce, *supra*, at 302-303.

and holding that "[a]n intent to permanently deprive is not an element of the federal offenses covering the mere 'taking' from the 'person or presence' of another") (citing 18 U.S.C. 2111, 2113, 2118), cert. denied, 517 U.S. 1228 (1996). Section 2113(b), however, *also* requires that the perpetrator "carries away" the property. The term "carry" is defined as "to move while supporting." *Webster's*, *supra*, at 343; see *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). The phrase, "carries away" has common law antecedents, and means "[t]he act of removal or asportation, by which the crime of larceny is completed, and which is essential to constitute it." *Black's Law Dictionary* 194 (6th ed. 1986). That asportation element is not present in the Section 2113(a) offense.

This Court has repeatedly noted that "a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990). That is particularly the case with elements of criminal offenses. See *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). Thus, notwithstanding petitioner's assertion (Br. 40) that Congress "tacitly included the asportation requirement as an element of the offense," this Court ordinarily presumes "that Congress acts intentionally and purposely" when including language in one part of a statute but omitting it from another. *Bates*, 522 U.S. at 29-30. Given that Congress specifically used the phrase "carries away" in Section 2113(b), it should not be lightly read into the text of Section 2113(a). See *ibid.*

That conclusion is especially important here, where the phrase in question had a distinctive common law connotation. As commentators explain, "[a] movement does not amount to asportation unless it is a *carrying-away* movement." R. Perkins & R. Boyce, *supra*, at

324. "The requirement of asportation may be eliminated entirely by statute, * * * but so long as it is retained, the common-law concept of a carrying-away movement should be required." *Ibid.* See also 2 W. LaFave & A. Scott, *supra*, at 348. Courts in States that have codified robbery offenses without a "carry away" element have uniformly held that the prosecution need not prove asportation.[15] Likewise, robbery as defined in Section 2113(a) should not be encumbered by common law limitations that Congress expressly elected to retain only for the bank larceny offense.

3. *Bank larceny, unlike bank robbery, requires proof that the property has a monetary value*

A third textual element found in bank larceny but not in bank robbery is the requirement that the prosecution

---

[15] See, *e.g.*, *State* v. *Boyle*, 970 S.W.2d 835, 838 (Mo. Ct. App. 1998) (upholding robbery conviction where defendant had not moved the property because under state statute "asportation is not an element of robbery"); *State* v. *Valdez*, 977 P.2d 242, 253 (Kan. 1999) ("Commission of robbery is complete when the robber takes possession of property; the element of asportation is not required to complete theft or robbery" under Kan. Stat. Ann. § 21-3426 (1995).); *Johnson* v. *State*, 744 So. 2d 833, 837 (Miss. Ct. App. 1999) (noting that "[p]roof of asportation, though an element of larceny, is not necessarily an element of robbery" since the statute includes as robbery "the mere attempt to take the property of another from his person or presence"); *State* v. *Gore*, 722 N.E.2d 125, 129 (Ohio Ct. App. 1999) (noting that "a robbery does not necessarily require asportation" under Ohio Rev. Code Ann. § 2911.01(A)(1) (Anderson 1999)). By contrast, in States where asportation is an element of robbery, courts have overturned convictions for failure by the prosecution to prove that the defendant carried away the property taken. See, *e.g.*, *State* v. *Johnson*, 558 N.W.2d 375 (Wis. 1997) (rejecting State's argument that asportation is not an element of robbery and holding that robbery of car involved no asportation where it failed to start or move).

prove that the property taken is reducible to a monetary value. Section 2113(b) permits a sentence of up to ten years' imprisonment if the stolen property exceeds $1000 in value, but only a sentence of up to one year imprisonment if the value is less than that amount. Thus, in a Section 2113(b) prosecution, the jury must be instructed to find that the property taken exceeded the amount necessary to trigger the greater punishment. See *United States* v. *Hoke*, 610 F.2d 678, 679 (9th Cir. 1980). Section 2113(a), on the other hand, contains no such monetary requirement. Rather, it proscribes the forceful taking of "any property or money or any other thing of value belonging to" the financial institution at issue, or the attempt to do so. Section 2113(a) thus criminalizes the forceful taking of property without requiring a jury finding as to the value of the property taken.

Petitioner contends (Br. 42-43) that the $1000 monetary threshold in Section 2113(b) bank larceny is a sentencing factor rather than an element of the offense. That analysis is incorrect. The $1000 is not simply an enhancement of the potential penalty a defendant faces. Rather, Congress deliberately set out two grades of the larceny offense in separate paragraphs, each of which defines a complete offense.[16] In addition, the value of the property taken differentiates a felony from a misdemeanor offense. See 18 U.S.C. 3559(a). The Fifth Amendment provides for federal felony charges to be made by a grand jury indictment; no such requirement

[16] Each paragraph begins with the word, "whoever"; it then describes the prohibited conduct, the intent required, and the nature of the property taken; and it concludes with a sentencing provision. That is the natural way to define a free-standing offense. See *Jones* v. *United States*, 526 U.S. 227, 233-234 (1999).

exists for misdemeanors. See *Ex parte Wilson*, 114 U.S. 417, 429 (1885) (defining "infamous crime" in Fifth Amendment as one "punishable by imprisonment at hard labor in a * * * penitentiary"). See generally Fed. R. Crim. P. 7(a); W. LaFave & J. Israel, *Criminal Procedure* § 15.1(a) at 616 (1985) (*Ex parte Wilson* definition "encompasses all federal felony offenses"). Contrary to petitioner's citation (Br. 43-44), nowhere did Blackstone report otherwise with regard to the "twelvepence" distinction between grand larceny and petit larceny. Rather, even at common law the valuation element differentiated the larceny offenses in a manner that would affect how they were charged and proved at trial. See R. Perkins & R. Boyce, *supra*, at 335 ("For many years the almost universal plan made grand larceny a felony and petit larceny a misdemeanor, although there were wide differences in the determination of the grade.").[17]

[17] The monetary valuation element in the theft of government property offense of 18 U.S.C. 641 distinguishes between felony and misdemeanor theft based on the value of the property taken. Courts appear uniformly to hold that the government must charge in the indictment and prove to the jury that the value of the property exceeds the threshold for felony theft. See, *e.g.*, *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976) (valuation an element of Section 641 offense), cert. denied, 429 U.S. 1038 (1977); *Stevens* v. *United States*, 297 F.2d 664, 665 (10th Cir. 1961) (per curiam) ("Value is an essential element of the offense [under 18 U.S.C. 641] which must be alleged and proved in the same manner as any other essential element of the offense."); *United States* v. *Wilson*, 284 F.2d 407, 408 (4th Cir. 1960) (holding value an element of the offense); *Cartwright* v. *United States*, 146 F.2d 133, 135 (5th Cir. 1944) (considering it "well settled that where the grade of larceny, and consequently the punishment, depend on the value of the property, it is essential that the value of the property defendant is charged with having taken be alleged and proved").

State practice supports that conclusion. Cf. *Jones*, 526 U.S. at 236 (discussing bodily injury factor in state robbery statutes). State statutes with similar language to the monetary valuation element in Section 2113(b) bank larceny have held that, because the valuation element must be proved in a larceny case, and because the prosecution need not prove a monetary value of the property taken to establish robbery, larceny is not a lesser included offense of robbery. *State* v. *Boucino*, 506 A.2d 125, 135 (Conn. 1986) (holding that "the crimes of robbery in the first degree and larceny in the first degree require proof of distinct elements * * * [because] [c]onviction for robbery in the first degree requires proof of varying degrees of force * * * [whereas] the state had to prove the value of the money taken from the bank in order to obtain a conviction on the charge of larceny in the first degree").[18]

[18] See *State* v. *McGarrett*, 535 N.W.2d 765, 769 (S.D. 1995) (applying statutory elements test, grand theft under state statute is not lesser included offense of robbery, because "grand theft requires the stolen property be in excess of $500 [whereas] robbery can be committed without complying with that dollar amount"); *State* v. *Ates*, 377 S.E.2d 98, 99 n.1 (S.C. 1989) ("In a grand larceny prosecution, value is a critical element; it is the State's burden to prove that the value of stolen goods exceeds $200."); *State* v. *Redding*, 331 N.W.2d 811, 813-815 (Neb. 1983) (holding value an element of larceny but ruling that failure to include it was harmless error); *State* v. *Combs*, 316 N.W.2d 880, 883 (Iowa 1982) (holding that monetary valuation is element of second degree theft); *People* v. *Myers*, 73 N.E.2d 288, 291 (Ill. 1947) (holding indictment for larceny "fatally defective" in part "for failure to allege the value of the goods stolen"); *Haley* v. *State*, 315 So. 2d 525, 527 (Fla. Dist. Ct. App. 1975) (holding that grand larceny "is not necessarily included in the offense of robbery" because grand larceny "contains an element not present in the offense of robbery: that the value of the property stolen was one hundred dollars or more"); *Coker* v. *State*, 396 So.2d 1094, 1096 (Ala. Crim. App. 1981) ("[w]hether or not a theft in a particular case is of one degree or another is a question of fact addressed to the jury").

B. The Legislative History Of Section 2113 Does Not Show Congressional Intent To Make Bank Larceny A Lesser Included Offense Of Bank Robbery

In arguing that bank larceny should be treated as a lesser offense of bank robbery, despite the textual elements of bank larceny not found in the putatively "greater" offense, petitioner relies (Br. 14-20) on the rule of statutory construction that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Moskal*, 498 U.S. at 114 (quoting *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). Because larceny was a lesser included offense of robbery at common law, petitioner maintains that Congress must have intended to make the crime proscribed in Section 2113(b) a lesser included offense of the Section 2113(a) crime. See Pet. Br. 24-26. That argument, however, cannot be squared with the legislative history of Section 2113 or this Court's prior construction of the statute. Those sources demonstrate that Congress did not intend merely to codify the common law in Section 2113, but rather intended to create federal offenses with specific elements designed to address contemporary needs.

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *The Law of Crime* 258-263 (1946). Robbery was an aggravated form of larceny; it contained all of the elements of larceny plus two additional ones: (1) the property must be

taken from the person or presence of another (2) by means of force or putting in fear. See 2 W. LaFave & A. Scott, *supra*, §§ 8.2, 8.11, at 333, 437-438. Common law robbery was often defined in simple and undetailed language, such as "the felonious and violent taking of goods or money from the person of another by force or intimidation." *Id.* § 8.11 n.6. The phrase "felonious * * * taking" meant a taking with the intent to deprive the owner permanently of his property. R. Perkins & R. Boyce, *supra*, at 343. Because, under common law, robbery contained all of the elements of larceny (plus the additional elements of personal presence and force), larceny is a lesser included offense of robbery in those jurisdictions that have retained the common law definitions of the two crimes. See, *e.g.*, *Government of the V.I.* v. *Jarvis*, 653 F.2d 762, 765 (3d Cir. 1981); *United States* v. *Belt*, 516 F.2d 873, 875 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). See generally R. Perkins & R. Boyce, *supra*, at 343 (defining "robbery" as "larceny from the person by violence or intimidation").

2. As already interpreted by this Court's decisions, however, the language and background of Section 2113 reveals that Congress did *not* intend to codify the common law in that provision. Before 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. § 5209 (1875 ed.), as amended by the Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972), but not robbery, larceny, or burglary, which were punishable only under state law. In 1934, Congress enacted the precursor to Section 2113(a) in response to a series of bank robberies committed by John Dillinger and other criminals who moved from State to State and were able to avoid capture by state authorities. See *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943)

(discussing legislative history of bank robbery statute); *Bell* v. *United States*, 462 U.S. 356, 363-364 (1983) (Stevens, J., dissenting) (same). The Attorney General proposed legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (§ 3), and theft (§ 2). The 1934 bill passed the Senate in that form, but the House Judiciary Committee, without explanation, struck the burglary and theft provisions from the bill. See *Jerome*, 318 U.S. at 102-104; *Bell*, 462 U.S. at 364 & n.2 (Stevens, J., dissenting). The bill enacted by Congress applied to bank robbery and certain violent crimes committed during a bank robbery. The bank robbery offense punished "[w]hoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783.

The 1934 statute left gaps in its protection of federal banks. Because the statute did not cover bank larceny, a person who stole money from a bank without force, violence, or "putting in fear" was immune from federal prosecution. In 1937, the Attorney General proposed amending the bank robbery statute to close that loophole. See H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937); *Bell*, 462 U.S. at 361; *Jerome*, 318 U.S. at 103. Congress ultimately passed a bill that prohibited bank larceny and bank burglary. The 1937 statute's larceny offense punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The 1937 version of bank larceny is

identical to the version presently codified in Section 2113(b) in all relevant respects.[19]

In 1948, Congress codified the criminal code. Act of June 25, 1948, ch. 645, 62 Stat. 683. As part of that codification, Congress made several changes to the bank robbery offense. The principal statutory changes were the deletion of the term "feloniously" before the terms "takes" and "attempts" and the substitution of the term "intimidation" for "putting in fear."[20] The Historical and Revision Notes (Reviser's Note) to Section 2113 are silent on the reason for removing the term "feloniously" from the bank robbery offense. The Reviser's Note stated, in language that mirrored the comprehensive House report accompanying the legislation, that "[n]ecessary minor translations of section references, and changes in phraseology, were made."

---

[19] Petitioner argues (Br. 31) that because the 1937 legislation used the common law word "larceny" in its caption, Congress intended for bank larceny to be a lesser included offense of bank robbery. The title to the 1937 law, however, is irrelevant to the construction of the bank robbery offense, since that offense was amended in 1948. In any event, the title to the statute is useful only if there is ambiguity in the text; it may not limit the plain meaning of the statute. See, *e.g.*, *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Railroad Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947).

[20] The 1948 revision also amended the bank burglary offense by substituting the phrase "felony affecting such bank and in violation of any statute of the United States, or any larceny" for the term "felony or larceny." The Historical and Revision Notes (Reviser's Note) indicate that that change was intended to conform the statute to the Court's decision in *Jerome*, which held that the term "felony" in the bank burglary offense embraced only those offenses that are felonies under federal law affecting banks protected by the Act. See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same).

See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same language used by House Committee to explain change).

3. As the foregoing history demonstrates, the offenses in Section 2113(a) and (b) do not simply replicate their common law antecedents of robbery and larceny. The 1934 and 1937 statutes contained a mix of common law and modern terms. The common law mental element of larceny—"feloniously takes"—was incorporated into bank robbery in 1934 but eliminated in 1948. The mental element of bank larceny—"intent to steal or purloin"—"has no established meaning at common law." *Bell*, 462 U.S. at 360.[21]

This Court has recognized that the 1934 and 1937 statutes contained elements that were broader than the common law. See *Bell*, 462 U.S. at 361 ("Section 2113(b) * * * goes well beyond even this expanded definition" of the common law crime of "larceny," and thus "the

---

[21] In *Turley*, 352 U.S. at 411-412, the Court noted that the term "steal[]" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir. 1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978).

An "intent to steal" has a broader scope than the common law's intent to deprive the owner permanently of his property. An intent to steal includes the intent to deprive permanently or for an unreasonable length of time, or in such a way that the owner will thus be deprived of his property. See 2 W. LaFave & A. Scott, *supra*, § 8.5. By contrast, a person does not have a common law intent to steal if he intends to return the very property taken, and it is unclear whether it is a defense that he intended to return equivalent property. *Id.* §§ 8.5(a), 8.5(b), at 358-359, 359-362.

statutory language does not suggest that it covers only common-law larceny."). At common law, larceny was limited to thefts of tangible personal property. The statute, however, covers theft of "any property or money or any other thing of value." 18 U.S.C. 2113(a) and (b) (1994 & Supp. IV 1998). Moreover, common law larceny required a theft from the possession of the owner. By contrast, the bank larceny statute applies when the property is in the "care, custody, control, management, or possession of, any bank." *Ibid.* Based on that broad language, *Bell* held that bank larceny in Section 2113(b) is not limited to common law larcenies. 462 U.S. at 360-361. For similar reasons, there is no sound basis for importing common law elements into Section 2113(a)'s robbery offense that Congress omitted from its text.

4. Petitioner contends (Br. 33-34) that the deletion of the term "feloniously" from the bank robbery statute in the 1948 codification was inadvertent and was not intended to delete the specific intent element from the offense of bank robbery. He maintains that that amendment was part of Congress's decision to delete most references to "felony" and "misdemeanor" from the Code because those terms were defined in Section 1 of Title 18. See 18 U.S.C. 1 (1982).[22]

Petitioner's contention is incorrect. When Congress deleted the term "felony" or "misdemeanor" from a

[22] Congress codified those terms in one section because, before 1948, the lack of uniformity in statutory usages of "felony" and "misdemeanor" had caused courts to diverge when assessing whether a particular crime should be punished as a felony or a misdemeanor. See H.R. Rep. No. 304, *supra*, at A2-A4. Section 1 of Title 18 was repealed by Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027.

statute because of Section 1, the Reviser's Notes to the statute specifically explained that as the reason for the change.[23] By contrast, the Reviser's Note to Section 2113(a) is silent on the reason for the deletion of "feloniously." See also H.R. Rep. No. 304, *supra*, at A134-A135 (same). Thus, petitioner (Br. 32-34) has no basis for asserting that Section 1 was the reason Congress deleted "feloniously" from Section 2113(a).

The disputed deletion was not an isolated action. Congress also deleted the term "feloniously" before the term "takes" in the offense that proscribes a forceful taking within the special maritime and territorial jurisdiction of the United States under Section 2111. 18 U.S.C. 2111; see Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144.[24] The Reviser's Note gives no reason for that deletion, stating only that "[m]inor changes were made in phraseology." See also H.R. Rep. No. 304, *supra*, at A134 (same). Nor is petitioner aided by the

[23] See, *e.g.*, Reviser's Note to 18 U.S.C. 751 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A67 (same); Reviser's Note to 18 U.S.C. 550 ("Reference to felony * * * was omitted as unnecessary in view of definition of felony in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A47 (same); Reviser's Note to 18 U.S.C. 2076 ("The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of 'misdemeanor' in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A134 (same); Reviser's Note to 18 U.S.C. 1951 ("Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title"), H.R. Rep. No. 304, *supra*, at A131 (same).

[24] Section 2111 of Title 18 provides: "Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

statement in the Reviser's Note that only changes "in phraseology" were made. Where Congress specifically deletes or omits an element of an offense from the statute, the change is substantive despite the Revisers' Notes to the contrary. See *Wells*, 519 U.S. at 497 (noting that "[d]ropping the materiality element from the three [bank offenses] could not, then, reasonably have been seen as making no change" and that "[t]hose who write revisers' notes have proven fallible before"); *United States* v. *Lanier*, 520 U.S. 259, 268 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). In short, the Reviser's Notes are not a basis for disregarding the plain language of Section 2113(a), which, unlike Section 2113(b), does not contain specific intent, asportation, or monetary valuation requirements.

C. Precedent And Canons Of Statutory Interpretation Do Not Support Petitioner's Argument

1. Petitioner contends (Br. 36-37) that *Prince* v. *United States*, 352 U.S. 322 (1957), indicates that bank robbery contains the same intent to steal element as bank larceny. That contention is mistaken. In *Prince*, the Court held that Congress did not authorize cumulative punishment for convictions for bank robbery and entering the bank with intent to commit a felony, both of which are prohibited by Section 2113(a). The Court reasoned that Congress inserted the offense of unlawful bank entry into the statute in 1937 to reach a person who entered a bank to rob it but was able to obtain the bank's money without using force or intimidation, and it inserted larceny offenses for similar reasons. The Court stated that the statute could serve the purpose of

reaching those acts without being read to create completely independent offenses. Thus, while it "was manifestly the purpose of Congress to establish lesser offenses" in drafting the statute, the Court found no indication that Congress intended to "pyramid" the penalties. *Id.* at 327.

The Court's statements that Congress's purpose was to create lesser offenses in the 1937 legislation and that the mental element of an intent to steal required for unlawful bank entry "merges" into the offense of bank robbery upon consummation of the robbery, 352 U.S. at 328, do not resolve the issue in this case. First, the "narrow" issue before the Court, *id.* at 325, was whether the statute authorized cumulative punishment for the two offenses, and that was the only issue the Court resolved, *id.* at 324-325. Thus, even if this Court were to apply the holding of *Prince* to convictions obtained under the first paragraph of Section 2113(a) and Section 2113(b), such a holding would not compel a trial court to give an instruction for a lesser included offense if the government were to indict the defendant only for a violation of Section 2113(a). A proper application of *Prince* would require only that guilty verdicts under those two provisions be merged into one conviction.

Merger analysis is separate from the lesser offense issue presented here. Under this Court's cumulative punishment jurisprudence, the test is whether Congress intended to authorize *punishment* for the two crimes to be imposed cumulatively. If it so chooses, Congress can authorize cumulative punishment for a greater and lesser offense. Cf. *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). Likewise, Congress can forbid cumulative punishment even where two crimes may not bear

the relation of greater and lesser offenses. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11 (1978) (finding cumulative punishment barred for two offenses, but not reaching question whether offenses were greater and lesser offenses). Thus, it was not necessary for the Court in *Prince* to conclude that bank robbery had an intent-to-steal element to hold that cumulative punishment was barred for bank robbery and unlawful entry of a bank.

Second, although *Prince* remarked in passing that "the purpose of Congress [was] to establish lesser offenses," 352 U.S. at 327, the Court in that case did not analyze the lesser included offense issue by comparing the elements of each offense. This Court's subsequent decision in *Schmuck* now requires that approach. Indeed, in conducting its analysis, the *Prince* Court did not even have before it a charge of Section 2113(b) bank larceny in the case. Thus, *Prince* does not establish that bank larceny is a lesser included offense of bank robbery.[25]

---

[25] Nor does this Court's decision in *United States* v. *Gaddis*, 424 U.S. 544 (1976), support the conclusion that Section 2113(b) is a lesser included offense of bank robbery. In that case, the Court held that a defendant could not be separately convicted for both committing bank robbery in violation of Section 2113(a) and for receiving the proceeds of a bank theft in violation of Section 2113(c). It also held that if a jury erroneously did so, the defendant would not be entitled to a new trial if the evidence supported the verdict as to conviction for the Section 2113(a) offense. *Id.* at 550. While *Gaddis* could be taken to imply that bank larceny is a lesser offense of bank robbery (since subsection (c) explicitly refers only to the larceny and not the robbery subsection), that is not a point that the Court explicitly made or on which it relied in its holding. *Gaddis* therefore simply prevents unintended multiple punishments under Section 2113; it does not express a view of greater and lesser offenses under that provision. Indeed, *Gaddis* relied on

Finally, the essential holding of *Prince* is that Congress did not intend to pyramid punishments for unlawful bank entry and completed bank robbery; today that result would be achieved under the Sentencing Guidelines. Sentencing under the Guidelines generally takes account of the total course of a defendant's conduct and "groups" the related counts to prevent improper incremental punishment for closely related counts. See Sentencing Guidelines Ch. 3, Pt. D (1995). Thus, if a defendant in the position of petitioner were to be charged and convicted separately of Section 2113(a) bank robbery and Section 2113(b) bank larceny, the bank larceny conviction would have no effect on petitioner's length of incarceration. See *id.* § 2B3.1 (Robbery Guideline).

2. Petitioner also contends (Br. 34-35) that, under *Morissette*, *supra*, bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948. That proposition is correct, but it does not lead to the conclusion that the mental element in the first paragraph of Section 2113(a) is a specific intent to steal.

In *Morissette*, 342 U.S. at 276, the Court read the offense of conversion in the federal theft statute, 18 U.S.C. 641,[26] to require proof of an intent to "deprive

---

Heflin v. *United States*, 358 U.S. 415, 419 (1959), which had stated that "subsection (c) [of Section 2113] was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." 424 U.S. at 547.

[26] As the Court's opinion reflects, the text of 18 U.S.C. 641 at that time, in pertinent part, made it an offense for anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes

another of possession of property," despite the absence of such an element from the text of the statute. The Court reasoned that, at common law, "there are unwitting acts which constitute conversions" in the civil tort context. 342 U.S. at 270. "Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions." *Ibid.*

As the Court reasoned, "It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions." 342 U.S. at 272. The Court noted that, even though the "1948 Revision was not intended to create new crimes but to recodify those then in existence," the offense of "'converts' does not appear in any of [18 U.S.C. 641's] predecessors." 342 U.S. at 269 n.28.

The Court's analysis in *Morissette* does not apply to the bank robbery statute for three reasons. First, the Court construed a common law word, "converts," and attributed to Congress the intent to include the associated mental element from the common law where Congress had not otherwise specified the elements of the crime. In the bank robbery and bank larceny offenses, however, Congress specifically used some elements from the common law and changed others. See pp. 33-34, *supra*. Second, in *Morissette* the Court emphasized the importance of the mental element in

---

of any record, voucher, money, or thing of value of the United States." *Morissette*, 342 U.S. at 248 n.2.

avoiding criminalizing what otherwise would be "unwitting, inadvertent and unintended conversions." 342 U.S. at 270. That concern is not present in the bank robbery context, because the defendant's knowing use of force to take property is sufficient to demonstrate culpable conduct. See, *e.g.*, *DeLeo*, *supra*.

Third, the 1948 codification of the bank robbery statute differs in important respects from the history of Section 641. Congress's specific elimination of "feloniously" from the bank robbery section of the statute, while retaining the "intent to steal or purloin" element in the bank larceny section of the statute, showed an "affirmative instruction" to delete an intent to steal from the bank robbery statute. *Morissette*, 342 U.S. at 273. Congress is presumed to know the law when it legislates. See *Albernaz*, 450 U.S. at 341. It knew that it could follow the common law definition of robbery in the statute by simply using the word "rob" or "robbery" in defining the offense, because previous statutes using those terms had been interpreted as having incorporated the common law meaning of the offense. See *Harrison* v. *United States*, 163 U.S. 140, 142 (1896) (statute prohibiting robbery of the mails). Thus, Congress must be presumed to have understood that it was making a substantive change in the law when it deleted the term "feloniously" from the bank robbery statute.[27]

---

[27] Although petitioner has not invoked it, the rule of lenity does not justify reading an "intent to steal" element into bank robbery. That rule "applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138 (internal quotation marks omitted). Lenity thus requires a narrow construction of a statute when the statute contains a "grievous ambiguity or uncertainty." *Staples*, 511 U.S. at 619 n.17 (quoting *Chapman* v.

3. Petitioner's reliance (Br. 15-16) on *Neder* v. *United States*, 527 U.S. 1 (1999), is also misplaced. In *Neder*, the Court held that materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343) and bank fraud (18 U.S.C. 1344) statutes, despite the absence of an express materiality element in the text of those offenses. The Court noted that, at common law, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." 527 U.S. at 22. The Court noted that Congress presumably intends to incorporate the meaning of common law terms in criminal statutes and that it could not infer, absent a contrary indication from Congress, that the mere omission of materiality evidenced an intent to drop that element from the fraud statutes. Finding no such contrary indication from the legislative history of the statutes, the Court concluded that materiality was an element of those fraud statutes. *Id.* at 22-23.[28]

The bank robbery statute differs in important respects from the fraud statutes in *Neder*. First, the fraud statutes used a common-law term that had an accepted meaning, and the question was whether Congress intended to incorporate that meaning into the offense; in contrast, the bank robbery statute uses a

---

United States, 500 U.S. 453, 463 (1991)). In this case, however, the language and the legislative history of Section 2113(a) demonstrate that the omission of an "intent to steal" element from bank robbery was deliberate. There is no "grievous ambiguity" in Section 2113(a); thus the rule of lenity is not applicable. See *Muscarello*, 524 U.S. at 139.

[28] The Court rejected the government's arguments that materiality was not incorporated because the statutes were broader than the common law and that other fraud statutes do not contain an express materiality element. 527 U.S. at 22-23 & n.7.

combination of common-law and non-common-law terms to define the elements of the offense. Petitioner thus is forced to argue that common-law terms ("take") in Section 2113(a) incorporate other elements ("specific intent to steal") or that the additional elements found in bank larceny but not in robbery are unimportant. Second, unlike the federal fraud statutes, which omitted an express materiality element from their inception, Congress expressly deleted the "feloniously" element from the bank robbery statute in 1948. Congress' express elimination of the common law mental element from the statute demonstrates that Congress did not intend to restrict bank robbery to its common law mental element.

II. EVEN IF BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER THE STATUTORY ELEMENTS TEST, THERE WAS NO ERROR IN THE CHARGE TO THE JURY

Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Stevenson* v. *United States*, 162 U.S. 313, 314-315 (1896). Thus, a factual dispute must exist as to an element of the greater offense that, if resolved in the defendant's favor, would still result in a conviction on the lesser offense. See *Sansone* v. *United States*, 380 U.S. 343, 350-351 (1965); see also 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-29. If there is no factual dispute, the court need not give a charge for the lesser included offense. See, *e.g.*, *United States* v. *Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993),

cert. denied, 510 U.S. 1040 (1994); *United States* v. *Payne*, 805 F.2d 1062, 1067 (D.C. Cir. 1986). Thus, in addition to *all* of the elements of the uncharged offense being encompassed within the charged offense and to having *fewer* elements than the charged offense, the evidence must support a conviction on the lesser, but not the greater, offense charged. See *Schmuck*, 489 U.S. at 717 & n.9; *Sansone*, 380 U.S. at 350; *Berra* v. *United States*, 351 U.S. 131, 134 (1956).

In this case, the district court specifically instructed the jury on whether petitioner had taken property "by force and violence, or by intimidation":

> Now the phrase by force and violence or by intimidation used in the statute means either first, the use of actual physical strength or actual physical violence; or second, doing some act or making some statement to put someone in fear of bodily harm.
>
> The intimidation must be caused by an act knowingly and deliberately done or a statement knowingly and deliberately made by the particular defendant and that it was done in such a manner or under such circumstances that would produce such a reaction or such fear of bodily harm in a reasonable person.

J.A. 56. The court also properly denied petitioner's Rule 29 motion for acquittal, concluding that "the facts of this case are far removed from a peaceable and stealthy theft of money from this bank and I think that a reasonable jury could indeed find beyond a reasonable doubt * * * [that] the behavior of [petitioner] was such as could put a reasonable person in fear of bodily harm and that that could amount to force or intimidation such as to satisfy the third element of the bank

robbery offense." *Id.* at 32. Petitioner's contrary claim, which the district court correctly rejected, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them—and thus was guilty of bank larceny—without also finding that he used intimidation to obtain the money. Despite petitioner's efforts in his own testimony to convince the jury that he had not used force or intimidation, see C.A. App. 180-189, the evidence showed that intimidation occurred.[29]

More importantly, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, *i.e.*, without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. To the contrary, the evidence can support only one conclusion: petitioner gained access to the teller station and took the money

---

[29] Petitioner entered the bank wearing a ski mask and several layers of clothing even though it was warm outside; he restrained a customer from leaving and pushed her back into the bank, causing her to be so terrified that she screamed and later hid in her car praying on the floor of it; he vaulted the teller counter and got so close to a teller that she yelled "that a robber was after her"; he then vaulted back over the counter and "warned that no one was to follow him." J.A. 82. Moreover, other testimony established that the tellers and customer were terrified. See, *e.g.*, C.A. App. 32 (testimony of Maria Zahn) (testifying that "I screamed out loud" because "I was scared"); *id.* at 79 (testimony of Mildred Calacal) (describing fellow bank teller Christine Sentech as "crying and trembling").

"by intimidation" within the meaning of Section 2113(a). Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required, even if this Court were to conclude that bank larceny is a lesser included offense of bank robbery under the statutory elements test.[30]

---

[30] Because the same analysis will generally apply in bank robbery prosecutions, the question whether bank larceny is a lesser included offense of bank robbery would rarely affect the trials or results in bank robbery prosecutions. Cases in which bank robbery defendants are able to present plausible evidence that the tellers willingly allowed the defendant to take money from their teller stations without intimidation are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention the issue presented in this case have upheld the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See, *e.g.*, *United States* v. *Cornillie*, 92 F.3d 1108, 1109-1110 (11th Cir. 1996); *United States* v. *Sandles*, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996); *United States* v. *Walker*, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); *United States* v. *Lajoie*, 942 F.2d 699, 700-701 (10th Cir.), cert. denied, 502 U.S. 919 (1991); see also *United States* v. *Perry*, 991 F.2d 304, 310-311 (6th Cir. 1993) (declining to address the appellant's contention that bank larceny is a lesser included offense because no rational jury could find that the teller handed money to the defendant voluntarily).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
THOMAS E. BOOTH
Attorney

MARCH 2000

APPENDIX

1. Federal Rule of Criminal Procedure 31(c) provides:

> **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

2. Section 2113 of Title 18 provides:

> **Bank robbery and incidental crimes**
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or

in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of

the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

Supreme Court, U.S.
FILED
APR 07 2000
CLERK

Apr 7 2000

No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER FLOYD J. CARTER

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner Floyd J. Carter

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 17

Bates v. United States, 118 S. Ct. 285 (1997) 7

Bell v. United States, 462 U.S. 356 (1983) 2, 14, 15

Evans v. United States, 504 U.S. 255 (1992) 5, 14

Heflin v. United States, 358 U.S. 415 (1959) 9

Jones v. United States, 119 S. Ct. 1215 (1999) 17

Keeble v. United States, 412 U.S. 205 (1973) 18, 19, 20

Morissette v. United States, 342 U.S. 246 (1952) ... *passim*

Neder v. United States, 119 S. Ct. 1827 (1999) 4, 5, 6, 8, 12, 14

Prince v. United States, 352 U.S. 322 (1957) 2, 3, 9, 13

Regina v. Bass, 11 Mod. 55, 88 Eng. Rep. 881 (K.B. 1705) 7

Reno v. Koray, 515 U.S. 50 (1995) 17

Rewis v. United States, 401 U.S. 808 (1971) 17

United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395 (1947) 19

United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970) 4

United States v. Gaddis, 424 U.S. 544 (1976) 9

United States v. Higgins, 40 M.J. 67 (Ct. Mil. App. 1994) 12

United States v. Johnston, 543 F.2d 55 (8th Cir. 1976) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 19

United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998) 18

United States v. Shabani, 513 U.S. 10 (1994) 7

United States v. Wells, 117 S. Ct. 921 (1997) 7, 8

STATUTES

10 U.S.C. § 934 12

18 U.S.C. § 373 (1994) 11, 12

18 U.S.C. § 641 10

18 U.S.C. § 645 (1994) 11

18 U.S.C. § 656 7

18 U.S.C. § 1014 ..... 7, 8

18 U.S.C. § 2113 ..... *passim*

18 U.S.C. § 2314 (1994) 16

18 U.S.C. § 2315 (1994) 16

20 U.S.C. § 1097 ..... 6, 7

21 U.S.C. § 846 7

OTHER

4 William Blackstone, *Commentaries* 2, 16

House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947) 15

2 LaFave & Scott, *Substantive Criminal Law* (1986 & Supp. 1999) 5, 6, 11

ARGUMENT

Respondent's admissions make this a simple case. Respondent admits, as it must, that "under common law, robbery contained *all* of the elements of larceny," including the requirements of asportation and felonious intent. Resp. Br. 30 (emphasis added). Respondent also admits that, prior to the recodification of all federal criminal statutes in 1948, "[t]he common law mental element of larceny – 'feloniously takes' – was incorporated into bank robbery in 1934." Resp. Br. 33. Finally, Respondent admits that, under this Court's decisions in *Morissette v. United States*, 342 U.S. 246 (1952), and similar cases, "bank robbery *must* be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." Resp. Br. 39 (emphasis added); *id.* at 19 ("There is a presumption that any federal criminal offense requires a mental element. Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one.") (citation omitted). Petitioner and Respondent are thus on common ground as to all three points. See Pet. Br. 20-24, 27-29, 14-20. The parties' dispute is largely reduced to one simple question: In 1948, when Congress recodified the offense of bank robbery, did it eliminate the specific "intent to steal" element that had been part of the offense for the fourteen previous years? The answer, equally simple, is "No."

The text, structure, and history of 18 U.S.C. § 2113, when viewed against the backdrop of common law principles about which there is *no* controversy, indicate that bank larceny has been defined as a lesser included offense of bank robbery, and Respondent offers nothing of substance to the contrary. At the outset, it is clear that a mechanical "plain text" approach is inadequate to construe the statute. Specifically, although Congress did not expressly include any intent element in the recodified

bank robbery provision, the parties agree that *some* mental element *must* be implied. The statute must therefore draw meaning from the common law tradition in which it is so firmly rooted. This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), which explained the relationship between the robbery and unlawful entry offenses in § 2113, provides additional support for the conclusion that bank robbery, like bank larceny, requires proof of the specific intent to steal. Nor does the decision in *Bell v. United States*, 462 U.S. 356 (1983), as Respondent would have it, cut the definitions of bank robbery and bank larceny free from their common law roots.

Petitioner was entitled to a lesser included offense instruction under a proper interpretation of the bank robbery and bank larceny provisions. He was prejudiced by the district court's denial of the instruction and a remand is therefore required.

1. The text of the statute and its common law antecedents compel the conclusion that bank larceny is a lesser included offense of bank robbery. This result is hardly surprising, inasmuch as larceny and robbery have been two closely linked members of a family of property crimes for centuries. See 4 William Blackstone, *Commentaries* *229-43 (discussing larceny and robbery in chapter entitled "Of Offences Against Private Property").

Respondent offers a series of "plain text" arguments. Resp. Br. 12-17 (regarding intent element), 23-25 (regarding asportation requirement). The core of Respondents' argument on intent is its observation that, "[w]hile bank larceny contains an express 'intent to steal or purloin' element, bank robbery has no such mental element in its text." Resp. Br. 12. Similarly, with respect to the asportation requirement, Respondent observes that the definitions for both bank robbery and bank larceny "use the word 'take[ ]' to describe the *actus reus* of the crime" but that the definition of larceny "*also* requires that the perpetrator 'carries away' the property." Resp. Br. 23-24. In

the remainder of its brief, however, Respondent thoroughly undermines whatever value such "plain text" arguments might otherwise have.

a. On the question of intent, Respondent admits, mere moments after setting forth its plain text arguments, that the meaning of the bank robbery statute is necessarily beyond the reach of a "plain text" approach. According to Respondent, "[a]lthough bank robbery has no specific intent to steal element, that does not mean that it lacks a mental intent element altogether. . . . There is a presumption that any federal criminal offense requires a mental element." Resp. Br. 19. This admission exposes the weakness of Respondent's plain text arguments.

Respondent cannot have it both ways. If, as Respondent correctly admits, this Court's federal criminal jurisprudence makes it proper to imply an intent element of some kind into the bank robbery statute (Resp. Br. 19-20, 39-40), then the plain text of § 2113 alone *cannot*, as Respondent argues elsewhere (Resp. Br. 12-17), provide the answer to the "lesser included offense" question in this case. Indeed, because Petitioner and Respondent agree that *some* intent element *must* be implied in the definition of bank robbery, only one question remains – namely, *which* intent element should be implied, general intent or the specific intent to steal?

Petitioner, by relying on the text, the common law and the statutory history of § 2113, as well as cases such as *Morissette* and *Prince*, has identified – on a principled basis – the specific intent to steal as the *mens rea* that Congress chose for the offense of bank robbery. Congress adopted this specific intent element as part of the definition of bank robbery in the original federal bank robbery statute in 1934 (Pet. Br. 27), and has stated nothing to the contrary since that time (Pet. Br. 30-38). Respondent, by contrast, contends that general intent is the proper choice and offers little in the way of persuasive support. For

example, Respondent cites some "diminished capacity" cases from the courts of appeals. Resp. 20 & n.11. Not one of the cases Respondent cites, however, determined the requisite intent for bank robbery by thoroughly analyzing the common law antecedents and statutory history of § 2113, as the *Morissette* decision requires. See *Morissette*, 342 U.S. at 260-71. Instead, these cases stopped with a superficial contrast among the plain text of the definitions of bank robbery, unlawful entry and bank larceny, which plain text definitions Respondent concedes are inadequate to the interpretive task at hand. See, *e.g.*, *United States v. Johnston*, 543 F.2d 55, 58 (8th Cir. 1976) ("A simple comparison of the language in the two paragraphs of § 2113(a) convinces us that Congress chose to define the second paragraph in terms of specific intent and consciously did not include language of specific intent in the first paragraph."); *United States v. DeLeo*, 422 F.2d 487, 490-91 (1st Cir. 1970) (same). These cases therefore provide little, if any, support for Respondent. Respondent also offers a jumble of policies generally related to robbery as a basis for implying a general intent element in the bank robbery statute. Resp. Br. 21-23. These *post hoc* policy arguments, which Respondent makes no effort to anchor to the statutory text or the common law, should be rejected.

Finally, Respondent also cites a host of other federal and state anti-robbery statutes, some of which purportedly require proof of specific intent, and some of which purportedly do not. Resp. Br. at 14-19. This Court has squarely held, however, that the express presence of a given common law element in other, arguably similar, federal criminal statutes "*cannot* rebut the presumption that Congress intended to incorporate the common-law" element in a disputed statute that appears to lack the element but is generally framed in common law language. *Neder v. United States*, 119 S. Ct. 1827, 1840 n.7 (1999) (emphasis added). "That rebuttal can only come

from the text or structure of the [disputed] statutes themselves." *Id.* Moreover, the statutes that Respondent cites show, at best, nothing more than that both Congress and the various state legislatures have used different verbal formulae to define different robbery-type crimes over the years. These other statutes do not, however, shed much light on precisely how Congress intended to define the crimes of federal bank robbery and bank larceny in § 2113, the issue in this case.

b. On asportation, Respondent relies exclusively on an apparent contrast between the plain text of the bank robbery and bank larceny definitions in § 2113. Resp. Br. 23-24 (bank robbery provision says "takes," whereas bank larceny provisions says "takes and carries away"). This apparent textual difference between the bank robbery and bank larceny provisions, however, actually reproduces a difference in the common law definitions of robbery and larceny. This textual difference thus supports Petitioner, not Respondent.

Specifically, Respondent admits that the "carries away" portion of the bank larceny statute is rooted in the asportation requirement for common law larceny. Resp. Br. 24. Congress thus used common law language – and, by inference, common law meaning – to define bank larceny. See, *e.g.*, *Neder*, 119 S. Ct. at 1839-41; *Evans v. United States*, 504 U.S. 255, 259 (1992); *Morissette*, 342 U.S. at 263. Respondent itself also notes that common law robbery, which plainly shared common law larceny's asportation requirement, "was often defined in simple and undetailed language" that makes *no* mention of asportation, "such as 'the felonious and violent taking of goods or money from the person of another by force or intimidation.' " Resp. Br. 30 quoting 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986 & Supp. 1999). Indeed, as LaFave and Scott observe, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often

in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common-law robbery." 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986 & Supp. 1999). At the same time, however, such robbery statutes nevertheless include an asportation requirement. See *id.* The elliptical definition of federal bank robbery in § 2113(a) thus conforms to a common feature of American robbery statutes generally. See also Pet. Br. 20-21 & n.16 (quoting robbery and larceny definitions from common law sources). In other words, Congress followed common law usage just as closely by leaving "carries away" implicit for bank robbery as it did by making "carries away" explicit for bank larceny. Common law meaning therefore follows.

Just as it did in the case of the specific intent requirement, Respondent also points to a diverse practice among the States, some of which have retained an asportation requirement in their definitions of robbery and some of which have not. Resp. Br. 25 & n.15. Again, however, the presumption that a federal crime framed in common law terms tacitly includes common law elements cannot be rebutted by different language in *other* statutes. See *Neder*, 119 S. Ct. 1840 n.7. And, in any event, the disparate practices of the states – some requiring proof of asportation, others not – does little to advance the analysis of § 2113, the specific federal statute at issue in this case.

c. The various statutory construction cases Respondent cites to support its plain text arguments do not advance its position. For example, in *Bates v. United States*, which Respondent relies on at pages 6, 10, and 24 of its brief, this Court held that the "specific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of [student loan] funds proscribed by" 20 U.S.C. § 1097(a). 118 S. Ct. 285, 288 (1997). In so holding, this Court contrasted 20 U.S.C. § 1097(a) against both § 1097(d)'s express

"intent to defraud" element and 18 U.S.C. § 656's prohibition on the willful misapplication of bank funds, stating that "§ 1097(a) *never* contained, as § 656 did, an 'intent to defraud' requirement, a requirement present from the start and still contained in § 1097(d)." *Id.* at 290 (emphasis added). However, as Respondent admits (Resp. Br. 33), the bank robbery statute – in sharp contrast to the statute at issue in *Bates* – *did* expressly contain a specific intent element, at least until 1948. *Bates* is simply inapposite.

Similarly, in *United States v. Shabani*, which Respondent relies on at page 16 of its brief, this Court held that the drug conspiracy provision at 21 U.S.C. § 846 does not require the government to prove an overt act in furtherance of the conspiracy. 513 U.S. 10, 11 (1994). In so holding, the Court followed the common law understanding of conspiracy rather than implying an overt act requirement into § 846, the text of which is silent on the point.[1] *Id.* at 13-14 ("[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms. We have consistently held that the common law understanding of conspiracy does *not* make the doing of any act other than the act of conspiring a condition of liability.") (internal quotations and citations omitted; emphasis added); see also *id.* at 16 ("the criminal agreement itself is the *actus reus* and has been so viewed since *Regina v. Bass*, 11 Mod. 55, 88 Eng. Rep. 881, 882 (K.B. 1705) ('[T]he very assembling together was an overt act') . . . "). In *United States v. Wells*, which Respondent relies on at page 36 of its brief, the Court declined to imply a materiality element into the false statement prohibition of 18 U.S.C. § 1014 because, among other things,

---

[1] Respondent inexplicably asserts, with reference to an overt act in furtherance of a conspiracy, that "such proof was required for common law conspiracy." Resp. Br. 17. This is simply incorrect. *See United States v. Shabani*, 513 U.S. 10, 13-14, 16 (1994).

the defendants did not "come close to showing that at common law the term 'false statement' acquired any implication of materiality that came with it into § 1014." 117 S. Ct. 921, 927 (1997); *compare Neder*, 119 S. Ct. 1839-41 (relying on common law to imply materiality requirement into federal mail, wire, and bank fraud statutes). In the case at bar, by contrast, the common law definitions of the offenses at issue – robbery and larceny – unequivocally support the conclusion that specific intent and asportation elements should be implied in the definition of federal bank robbery in § 2113(a). If anything, *Shabani* and *Wells* support Petitioner, not Respondent.

2. The structure of § 2113 as a whole indicates that bank larceny is a lesser included offense of bank robbery. Specifically, the "receiving stolen property"-type crime defined in subsection (c) of § 2113 refers only to property "taken or stolen . . . in violation of subsection (b)" – the bank larceny offense. 18 U.S.C. § 2113(c). It would be strange, indeed, to conclude that bank larceny is other than a lesser included offense of bank robbery, for – on that construction – one who receives stolen property from a bank robber has not committed the offense, but one who receives the same property from a bank larcenist *has* committed the offense. Pet. Br. 11-13. The anomaly disappears if bank larceny is, as Petitioner contends, a lesser included offense of bank robbery: anyone who commits the offense of bank robbery necessarily commits the lesser offense of bank larceny, and thus one who knowingly receives stolen property from a bank robber is no less guilty under subsection (c) than one who knowingly receives stolen property from a bank larcenist.

Respondent promises an answer on this point and then fails to deliver. Specifically, Respondent baldly asserts "that in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c)" (Resp. Br. 14 n.6), referring the reader to footnote 25 later in its brief. One will search footnote 25 in vain, however, for any

support for Respondent's contention that "in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c)." All that footnote 25 of Respondent's brief contains is a discussion urging a narrow view of the Court's decision in *United States v. Gaddis*, 424 U.S. 544 (1976), and a passing reference to *Heflin v. United States*, 358 U.S. 415 (1959).[2] Nowhere, however, does Respondent explain why subsection (c) of § 2113 proscribes knowing receipt of bank robbery proceeds "in most cases." Petitioner has offered the *only* explanation of how the statute proscribes knowing receipt of bank robbery proceeds in *all* cases – namely, by defining bank larceny as a lesser included offense of bank robbery.

3. Petitioner and Respondent agree on the basic events comprising the statutory history of § 2113. *Compare* Pet. Br. 27-33 *with* Resp. Br. 30-33. The parties disagree, however, about the proper conclusions to be drawn from that history. According to Respondent, "Congress's

---

[2] In *Heflin v. United States*, 358 U.S. 415, 419-20 (1959), this Court held that one could not be convicted of both the aggravated taking offense in 18 U.S.C. § 2113(d) and the unlawful receipt offense in 18 U.S.C. § 2113(c) for the same underlying conduct. The Court reasoned that "subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber," and that there was "no purpose of Congress to pyramid penalties for lesser offenses following the robbery." *Id.* at 419. In *United States v. Gaddis*, 424 U.S. 544, 547-51 (1976), this Court held that a new trial was not the exclusive remedy when multiple counts under 18 U.S.C. §§ 2113(a), (b), (c), and (d) were wrongly submitted to a jury in violation of the rules of *Prince v. United States*, 352 U.S. 322 (1957), and *Heflin*, 358 U.S. at 419-20. In doing so, this Court reaffirmed that "a person convicted of robbing a bank in violation of 18 U.S.C. §§ 2113(a), (b), and (d), cannot also be convicted of receiving or possessing the proceeds of that robbery in violation of 18 U.S.C. § 2113(c)." *Gaddis*, 424 U.S. at 547.

specific elimination of 'feloniously' from the bank robbery section of the statute, while retaining the 'intent to steal or purloin' element in the bank larceny section of the statute, showed an 'affirmative instruction' to delete an intent to steal from the bank robbery statute." Resp. Br. 41 (citing *Morissette*). The *Morissette* decision, however, forecloses this faulty analysis because there has been no such affirmative instruction to eliminate the specific intent element from the definition of federal bank robbery.

As was noted above, Respondent admits "that, under *Morissette, supra,* bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948". Resp. Br. at 39. Having done so, Respondent cannot by simple fiat ignore the thorough analysis of and reliance upon the common law antecedents of the federal crime in dispute that *Morissette* mandates. Pet. Br. 17-19, 34-35.

In *Morissette*, this Court carefully reviewed the several statutes that were drawn together and recodified at 18 U.S.C. § 641, together with their common law antecedents. Despite Congress's having trimmed the language of specific intent from the recodified statute, the Court concluded that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Along the way to reaching this conclusion, the Court rejected the government's contention in that case – essentially identical to Respondent's arguments here – that it was sufficient under the statute to require proof of general intent alone, and that Congress intended as much by dropping express references to the specific intent to steal from the predecessor statutes. *Id.* at 264. The Court rejected the argument because the common law, not the

government's current policy preference, remained the touchstone for interpreting the federal criminal statute. *Id.* at 263, 270-71. Congress's omission of the modifier "feloniously" from the recodified definition of bank robbery was no more an affirmative instruction to disregard the common law meaning of the remaining words in the statute than it was in *Morissette*.

Importantly, there is a simple and proven way for Congress to make its intent to break with the traditions of the common law in a given instance abundantly clear. For example, in 18 U.S.C. § 645 (1994), an anti-embezzlement statute aimed at court officers, Congress expressly provided that "[i]t shall not be a defense that the accused person had any interest in [the] moneys or fund" at issue. At common law, such a good faith claim of right to the allegedly embezzled funds was a valid defense. 2 LaFave & Scott, *Substantive Criminal Law* § 8.6(f)(1) (1986 & Supp. 1999) ("One who converts the property of another which is in his lawful possession is not guilty of embezzlement (for his conversion is not fraudulent) if, when he converts, he honestly believes the property is his own or is nobody's, or he otherwise honestly believes he is authorized to convert it.") (footnotes omitted). Congress first passed this particular anti-embezzlement statute, including its express negation of the "good faith claim of right" defense, in 1920 (Act of May 29, 1920, ch. 212, 41 Stat. 630), *i.e.*, 28 years *before* it recodified the bank robbery and bank larceny statutes and dropped the modifier "feloniously" from the definition of bank robbery.

Congress employed the same technique more recently in 18 U.S.C. § 373 (1994), which was first enacted in 1984 (Pub. L. 98-473, Title II, § 1003(a), 98 Stat. 1837, 2138) and criminalizes the solicitation of a crime of violence. Subsection (c) of this anti-solicitation statute expressly provides that "[i]t is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because," *inter alia*, "he lacked

the state of mind required for its commission" or "because he was incompetent or irresponsible." 18 U.S.C. § 373(c) (1994). Without this provision, the solicitee's lack of knowledge or intent could well be a defense for the solicitor. See, *e.g.*, *United States v. Higgins*, 40 M.J. 67, 68-70 (Ct. Mil. App. 1994) (reversing acceptance of guilty plea to solicitation of larceny under 10 U.S.C. § 934, and expressly distinguishing the contrary result that would be required under 18 U.S.C. § 373(c)).

If, as Respondent argues, Congress had intended to eliminate the specific intent element from the definition of bank robbery when it recodified the provision in 1948, it would have done more than merely drop the modifier "feloniously" from that definition. Instead, Congress would have expressly provided within the bank robbery provision – in much the same way it had done 28 years *earlier* in the anti-embezzlement statute aimed at court officers – that "it shall not be a defense that the accused person lacked the specific intent to steal." That Congress did not employ this already-familiar method reinforces the conclusion that Congress intended to hew to, not to break from, the common law.

Alternatively, Congress can break with the common law meaning of a federal crime by defining the crime in such a way that it precludes, at a structural level, the importation of one or more common law elements. This approach is illustrated by the fraud statutes construed in the *Neder* case. There, on the strength of the presumption in favor of common law meaning for common law terms, this Court held that "materiality is an element of a 'scheme or artifice to defraud' under the federal" mail, wire, and bank fraud statutes. 119 S. Ct. at 1839. At the same time, however, the Court explained that the basic structure of a "scheme to defraud" offense inherently precluded incorporation of the common law fraud elements of justifiable reliance and damages: "By prohibiting the 'scheme to defraud,' rather than the completed

fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted." *Id.* at 1841. In this case, however, Respondent does not – indeed, cannot – show that the basic structure of the bank larceny and bank robbery provisions logically precludes the interpretation of the statute for which Petitioner argues.

4. This Court's decision in *Prince v. United States*, 353 U.S. 322 (1957), provides direct support for petitioner. Pet. Br. 36-37. Respondent attacks Petitioner's reliance on *Prince* (Resp. Br. 36-39), asserting that "the 'narrow' issue before the Court [in *Prince*] was whether the statute" at issue here, 18 U.S.C. § 2113, "authorized cumulative punishment for the two offenses [of bank robbery and unlawful entry], and that was the only issue the Court resolved." Resp. Br. 37 (internal citation omitted). Respondent recites the result in *Prince* correctly, but ignores this Court's reasoning in *Prince*.

After analyzing the legislative history of § 2113, this Court concluded in *Prince* that an unlawful entry offense merges with a completed bank robbery, thus barring cumulative punishment for bank robbery and unlawful entry convictions. 352 U.S. at 325-29. Central to the Court's conclusion was the fundamental premise that both unlawful entry and bank robbery share the *same* specific intent to steal:

> The gravamen of the [unlawful entry] offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (emphasis added) (footnote omitted). As Petitioner has explained, the Court's reasoning in *Prince* makes sense only if bank robbery, like unlawful entry of a bank, has at its heart the specific intent to steal. Pet. Br.

37. Respondent does not, and cannot, refute this basic point.

5. The decision in *Bell v. United States*, 462 U.S. 356 (1983), does not, as Respondent contends, completely sever § 2113 from its common law roots. Resp. Br. 33-34. As Petitioner has explained (Pet. Br. 37 n.22), this Court held in *Bell* that the government can satisfy the "takes and carries away" element of bank larceny with proof that a defendant took the bank's property by false pretenses, a manner of taking property that fell outside the scope of the "takes" element of common law larceny. 462 U.S. at 359-60. It is equally clear, however, that whether by false pretenses or otherwise, a taking and carrying away was still a required element of the crime. As the Court was careful to state, § 2113(b) "does *not* apply to a case of false pretenses in which there is not a taking and carrying away."[3] *Id.* at 361 (emphasis added). In this case,

---

[3] As Petitioner has explained (Pet. Br. 37 n.22), and as this Court's decisions in *Evans v. United States*, 504 U.S. 255 (1992), and *Neder v. United States*, 119 S. Ct. 1827 (1999), illustrate, there is nothing incongruous in concluding that Congress has extended one aspect of a federal criminal offense beyond its common law confines, while hewing closely to the common law definition of the crime on another aspect of the very same offense. *See Evans*, 504 U.S. at 263-64 ("Although the present statutory text is much broader than the common-law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common law definition."); *Neder*, 119 S. Ct. at 1841 ("[T]he Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes. By prohibiting the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is

in sharp contrast to *Bell*, Respondent seeks *not* to broaden the manner of proving the specific intent element of bank robbery, as it did in expanding the meaning of "takes and carries away" in *Bell*, but rather seeks to eliminate the specific intent element from bank robbery altogether. Neither *Bell* nor any other decision of this Court supports such a result, and the seminal case of *Morissette* requires the conclusion urged by Petitioner.

6. As Petitioner has explained, the federal bank larceny provision sets forth two different degrees of punishment in two separate paragraphs, with the severity of the punishment depending upon the value of the property taken from the bank. Pet. Br. 41. Specifically, where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), ¶ 1, *with* 18 U.S.C. § 2113(b), ¶ 2; see House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947) ("the provisions of subsection (b) measur[e] the punishment [for larceny] by the amount involved"). The United States Sentencing Commission has, of course, made the amount of loss the preeminent factor in determining the sentence for theft offenses. Pet. Br. 44. However, with respect to the basic requirement that some property be stolen – *i.e.*, that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are identical in every respect.[4] See 18 U.S.C. § 2113(a), (b). In this respect,

---

inconsistent with a materiality requirement.") (citations omitted).

[4] The use of a monetary cut-off to distinguish between grades of punishment in the definition of federal bank larceny thus contrasts with those federal crimes where a monetary threshold is used to set a jurisdictional minimum that helps to define the crime, *i.e.*, an amount of money below which the

once again, the federal statute mimics the longstanding common law relationship between robbery and larceny, the latter of which was a lesser included offense of the former *and* had two different grades (with different punishments) depending on the amount of money stolen. Pet. Br. 40-41; 4 William Blackstone, *Commentaries* *229-42.[5]

Respondent urges that the different grades of larceny actually constitute completely different offenses. In urging this conclusion, Respondent relies on the fact that the larceny provision is broken into two separate paragraphs. Resp. Br. 26. But the argument ignores the more salient fact that the larceny provision is set off, as a single definition, in a separate lettered subsection. It is primarily in this fashion that different offenses are set off from one another in § 2113. Pet. Br. 42. Respondent also conflates the question whether a given fact is an element of the crime (or, instead, a sentencing factor) with the distinction between felonies (which must, in the federal system, be charged by indictment) and misdemeanors (which need not be). Resp. Br. 26-27. Nothing in this Court's case law on distinguishing sentencing factors

---

conduct is simply not a federal crime at all. *See, e.g.*, 18 U.S.C. § 2314 (1994) (setting $5,000 jurisdictional minimum for federal transporting-stolen-goods crime); 18 U.S.C. § 2315 (1994) (setting $5,000 jurisdictional minimum for federal receiving-stolen-goods crime).

[5] Respondent contends that Petitioner's opening brief miscites Blackstone's *Commentaries* regarding the relationship between petit and grand larceny and the fact that larceny was a lesser included offense of robbery notwithstanding the difference between the two grades of larceny. Resp. Br. 27. The contention is meritless. As Petitioner explained in detail (Pet. Br. 21, 40-41, 43-44) Blackstone clearly states both that petit and grand larceny were "considerably distinguished in their punishment, but not otherwise," and that robbery is an "[o]pen and violent larciny from the *person*." 4 William Blackstone, *Commentaries* *229, *241.

from elements of a crime, however, warrants subordinating that inquiry to the distinction between felonies and misdemeanors. Pet. Br. 42-44 (discussing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 119 S. Ct. 1215 (1999)).

7. Petitioner has demonstrated that, according to a straightforward application of settled rules of statutory construction for federal criminal statutes, bank larceny is a lesser included offense of bank robbery. Respondent, unprompted by petitioner, is at pains to urge that the rule of lenity does not apply in this case. Resp. Br. 41 n.27. Petitioner agrees, in the sense that the traditional rules of statutory construction, properly applied to the text and history of 18 U.S.C. § 2113, appear adequate to eliminate any doubt regarding the status of bank larceny as a lesser included offense of bank robbery. See *Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (internal quotes omitted) (citations omitted). If, however, this Court concludes that it can only guess at the intended effect of the 1948 recodification on the specific "intent to steal" element that respondent admits was part of the pre-1948 bank robbery statute (Resp. Br. 33), then this "ambiguity concerning the ambit of [bank robbery] should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S. 808, 812 (1971), *i.e.*, a specific "intent to steal" element for bank robbery.

8. Finally, according to Respondent, even if this Court concludes that bank larceny is a lesser included offense of bank robbery, the district court's refusal to give the "lesser included offense" instruction that Petitioner requested would not constitute a reversible error. Resp. Br. 43-46. This argument cannot be squared with the record in this case.

To be sure, the district court denied Petitioner's motion for a judgment of acquittal, holding that there

was adequate evidence to support a conviction for robbery if the jury chose to return such a verdict. J.A. 32. According to the district court, "a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case," that Petitioner was guilty of bank robbery. J.A. 32. However, the district court did *not* in any way consider or determine whether, based upon the evidence in this case, a jury could reasonably find him guilty of bank larceny and at the same time acquit him of bank robbery – the evidentiary standard for providing a lesser included offense instruction. See *Keeble v. United States*, 412 U.S. 205, 208 (1973) ("it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater").

The district court did not make a fact-based assessment about the propriety of a lesser included offense instruction on bank larceny because it viewed the issue as a purely legal matter. Specifically, the district court applied the Third Circuit's holding in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998), that *as a matter of law* bank larceny can never be a lesser included offense of bank robbery. J.A. 14 (citing *Mosley*); J.A. 30-31 (same). The Third Circuit's decision in this case also emphasized the purely legal nature of its ruling in *Mosley*. J.A. 84. Under the correct law, however, a fact-based evaluation should have been performed by the district court. The failure to conduct such an evaluation was not harmless, given the evidence that Petitioner did not use force, violence, or intimidation to take the money from the bank. Pet. Br. 2-7.

Respondent attempts to short-circuit this straightforward analysis, arguing that, by denying Petitioner's motion for acquittal, the district court in essence granted a directed verdict against Petitioner. According to

Respondent, "the evidence showed that intimidation occurred," and "the district court properly concluded [that] no reasonable juror could find otherwise." Resp. Br. 45. The record is clear, however, that the district court never considered whether, much less concluded that, "no reasonable juror could find otherwise" than "that intimidation occurred." Resp. Br. 45.

No matter how strong the evidence may be in the prosecutor's favor, the district court cannot direct a guilty verdict against the defendant. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 410 (1947). Moreover, a denial of the defendant's motion for acquittal has never been understood to constitute a finding of guilt. It is therefore not surprising that, in this case, the district court did not apply the directed verdict-type standard that Respondent erroneously invokes. Resp. Br. 45. Again, in denying Petitioner's motion for acquittal, the district court decided the narrow question whether "a reasonable jury could indeed find beyond a reasonable doubt" that all the elements of the crime of bank robbery had been proved. J.A. 32. The district court did not, however, resolve the far different question that Respondent posits, *i.e.*, whether a jury could reasonably *fail* to find that all the elements of bank robbery had been proved beyond a reasonable doubt (a directed verdict-type standard).

Nor is it an answer to Petitioner's request for a properly instructed jury to insist, as Respondent does, that the evidence against Petitioner was strong and that, if the jury had believed Petitioner's account of the relevant facts, it would have acquitted him of the crime on which it did receive instructions. This Court rejected the same argument almost thirty years ago, in *Keeble v. United States*, 412 U.S. 205 (1973). According to *Keeble*,

> if the prosecution has not established beyond a reasonable doubt every element of the offense

> charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or in any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-13. Time has not diminished the force of this reasoning. Moreover, just as in *Keeble*, "the nature of petitioner's intent" was the central element of the crime that "was very much in dispute at trial" in this case. *Id.* at 213. Respondent's argument that the district court's *per se* denial of the requested "lesser included offense" instruction in this case cannot be reversible error is squarely at odds with both the reasoning and the result in *Keeble*. It should be rejected.

CONCLUSION

For the foregoing reasons, Mr. Carter respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner
Floyd J. Carter

**Counsel of Record*

Feb 8 2000

(8)

Supreme Court, U.S.
FILED
FEB 8 - 2000
CLERK

No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
(*Counsel of Record*)
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707

Counsel for Amici Curiae National Association of Criminal Defense Lawyers and Association of Federal Defenders

Of Counsel
MARSHALL A. MINTZ

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 2

STATEMENT 3

SUMMARY OF ARGUMENT 3

ARGUMENT

I. *BANK LARCENY UNDER 18 U.S.C. § 2113(b) IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER § 2113(a) BECAUSE BANK ROBBERY, LIKE BANK LARCENY, REQUIRES SPECIFIC INTENT* 6

A. Attempts Are By Definition Specific Intent Crimes 6

B. 18 U.S.C. § 3559, Which Defines "Serious Violent Felonies", Lists Only Specific Intent Crimes, and Includes Among Them Bank Robbery Under 18 U.S.C. § 2113(a) 8

C. The Third Circuit's Construction Would Produce Anomalous Results ... 9

D. There Is Not Any Support for the "Exact Words" Test Effectively Adopted Below By the Third Circuit .. 13

E. Bank Larceny Is a Lesser Included Offense of Bank Robbery Regardless of Whether The Amount In Question Exceeds $1,000 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Commonwealth v. Griffin, 456 A.2d 171 (Pa. Super. Ct. 1983) 7

Commonwealth v. Stewart, 547 A.2d 1189 (Pa. Super. 1988) 14

Dennis v. United States, 341 U.S. 494 (1951) 9

Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960) 10,11

Liparota v. United States, 471 U.S. 419 (1985) 10

People v. Butler, 65 Cal. 2d 569, 421 P.2d 703, 55 Cal. Rptr. 511 (1967) 14

People v. M'Gowan, 1837 WL 2785 (N.Y. Sup. 1837) 16

State v. Mikesell, 30 N.W. 474 (Iowa 1886) 16

United States v. Brennan, 183 F.3d 139 (2d Cir. 1999) 15

United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) 16

United States v. Carter, 540 F.2d 753 (4th Cir. 1976) 16

United States v. Excitement Video,
513 U.S. 64 (1994) 10,11

United States v. Jenkins, 943 F.2d 167
(2d. Cir. 1991) 7

United States v. Mosley, 126 F.3d 200
(3rd Cir. 1997) 13,15

United States v. Rodriquez-Moreno,
526 U.S. 275 (1999) 15

United States v. Rosa, 11 F.3d 315
(2d Cir. 1993) 7

United States v. Stallworth,
543 F.2d 1038 (2d Cir. 1976) 7

*United States v. United States Gypsum
Co.*, 438 U.S. 422 (1978) 9,10

United States v. Walker, 75 F.3d 178
(4th Cir. 1996), *cert. denied*,
516 U.S. 1250 (1996) 16

STATUTES

United States Constitution, Amendment VI 3

18 U.S.C. § 113(a) 8

18 U.S.C. § 924(c) 9

18 U.S.C. § 1111 8

18 U.S.C. § 1112 8

18 U.S.C. § 2024(b)(1) 10

18 U.S.C. § 2111 9

18U.S.C. § 2113 6,9,12

18 U.S.C. § 2113(a) ..... passim

18 U.S.C. § 2113(b) ..... passim

18 U.S.C. § 2118 9

18 U.S.C. § 2119 9

18 U.S.C. § 2024(b)(1) 10

18 U.S.C. § 2241 8

18 U.S.C. § 2242 8

18 U.S.C. § 2244 (a)(1) 8

18 U.S.C. § 2244 (a)(2) 8

18 U.S.C. § 3006A 3

18 U.S.C. § 3559 8

18 U.S.C. § 3559(a) 9

18 U.S.C. § 3559(a)(2)(F)(i) 4,8,9

49 U.S.C. § 46502 9

OTHER AUTHORITIES

67 American Jurisprudence,
Second Edition, Robbery § 13 (1985) 14

Federal Jury Practice & Instructions § 21.03:
The Essential Elements of the Offense Charged 6,7

In The
Supreme Court Of The United States

OCTOBER TERM, 1999

No. 99-5716

FLOYD J. CARTER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND
ASSOCIATION OF FEDERAL DEFENDERS
IN SUPPORT OF PETITIONER

This brief *amici curiae* is submitted in support of Petitioner Floyd J. Carter. By letters filed with the Clerk of the Court, Petitioner and Respondents have consented

to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice, which includes preserving the integrity of the criminal justice process, ensuring the rights guaranteed

---

[1] As required by Rule 37.6 of this Court, *amici curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

persons by the Fifth Amendment to the United States Constitution, and providing fair trials to persons accused of crimes.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of Petitioner's claim that the Court of Appeals erred (i) in holding that bank larceny, as defined in 18 U.S.C. § 2113(b), is not a lesser included offense of bank robbery, as defined in 18 U.S.C. § 2113(a) and (ii) as a consequence, Petitioner was not entitled to a jury charge on both offenses.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT

Amici adopt Petitioner's statement of the case.

SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the integrity of the criminal justice system: whether, as Petitioner's first Question Presented asks, bank larceny, as defined in 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, as defined in 18 U.S.C.

§ 2113(a). The Third Circuit erred in answering that question in the negative, and in denying Petitioner's request for a jury charge on bank larceny.

By including the crime of attempted bank robbery in § 2113(a), Congress implicitly said what the Third Circuit failed to recognize, that the crime of bank robbery is one which requires a specific intent, lest a defendant be held to have attempted a crime which is unintentional.

Congress showed its intent to define bank robbery as a specific intent crime when it included bank robbery under § 2113(a) in 18 U.S.C. § 3559(a)(2)(F)(i), the section which defines "serious violent felonies". Congress created a list of offenses which constitute serious violent felonies, and included only offenses which require specific intent, going so far as to exclude involuntary manslaughter, while including manslaughter, clearly showing a desire to exclude from the list crimes which do not require specific intent.

The interpretive presumption that a *mens rea* is required in federal statutes undermines the Third Circuit's construction of the bank robbery statute, one that would classify bank robbery as a strict liability offense. The various factors that have been set forth to overcome this presumption do not support the Third Circuit's reading, and the common law definitions of robbery and larceny further the conclusion that specific intent is an element of robbery, and thus of bank robbery under § 2113(a).

The exact words test effectively set forth by the

Third Circuit sets an unworkable standard by which Congress and other legislatures should be judged when drafting statutes. Given the sheer number of criminal statutes, as well as the number of legislators involved in drafting and amending those statutes, holding that the exact words must be used time after time, ignoring the obvious intent of the drafters, would unduly burden the evolution of the law.

Lastly, the $1,000 language in the bank larceny statute does not affect the lesser included offense analysis because it only affects the level of the offense, but does not change the conduct which is sought to be prevented, specifically, the deprivation of property from its owner.

Accordingly, *amici* NACDL and AFD respectfully submit that the decision of the United States Court of Appeals for the Third Circuit should be reversed, and Petitioner's conviction should be vacated and remanded.

ARGUMENT

I. *BANK LARCENY UNDER 18 U.S.C. § 2113(b) IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER § 2113(a) BECAUSE BANK ROBBERY, LIKE BANK LARCENY, REQUIRES SPECIFIC INTENT*

In this case, as well as in the Briefs in *Mosely v. United States*, 1998 WL 290367, 389115, and 536167, and at oral argument before the Court in 1998, one of the issues that has drawn the most attention is whether bank larceny and bank robbery under 18 U.S.C. § 2113 are distinguishable, and the former not a lesser included of the latter, because bank robbery under § 2113(a) does not require specific intent, while bank larceny does.

Petitioner's Brief more than adequately addresses the history of the statute, and of the common law. In addition, though, there are other aspects of the analysis that fully support Petitioner's conclusion: that bank robbery under § 2113(a) does indeed require specific intent, and, as a result, that bank larceny under § 2113(b) is a lesser included offense.

A. Attempts Are By Definition Specific Intent Crimes

The bank robbery statute, 18 U.S.C. § 2113(a), punishes not only the actual *taking* of money from a bank by force, but also punishes "attempts" to do so. Historically, attempts are specific intent crimes. In order to sustain its burden of proof for the crime of attempt the *Federal Jury Practice & Instructions § 21.03: The Essential*

Elements of the Offense Charged, states that the government is required to prove "the defendant intended to commit the crime ..., and ... did an act constituting a substantial step towards the commission of that crime."

As the court explained in *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976), "the classical elements of an attempt are intent to commit a crime, the execution of an overt act in furtherance of the intention, and a failure to consummate the crime." Indeed, one cannot accidentally attempt a crime, but instead must actually intend their acts to be criminal in nature. *See United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993)(in order to establish that person is guilty of an attempt, government must prove defendant possessed intent to commit the offense and engaged in conduct amounting to a substantial step towards its commission); *United States v. Jenkins*, 943 F.2d 167 (2d. Cir. 1991)(crime of attempt is an inchoate offense that provides means of punishing individuals who have sufficiently manifested their intent to commit a particular substantive offense, yet have failed to consummate it).

Thus, since 18 U.S.C. § 2113(a) includes "attempts" among its prohibited activities – without establishing a separate intent provision – the intent required under the section must be *specific* intent. Otherwise, the inconsistency would create the perverse result of making *attempted* bank larceny, under § 2113(b), a lesser included offense of *attempted* bank robbery, under § 2113(a), yet leaving the *substantive* crimes separate and distinct. *See Commonwealth v. Griffin*, 456 A.2d 171, 177 (Pa. Super. Ct. 1983)(logically

impossible to attempt second or third degree murder because they are unintentional crimes).

B. 18 U.S.C. § 3559, Which Defines "Serious Violent Felonies", Lists Only Specific Intent Crimes, and Includes Among Them Bank Robbery Under 18 U.S.C. § 2113(a)

Similarly, 18 U.S.C. § 3559 lists those offenses that are considered "serious violent felonies." Among them – including bank robbery under §2113(a) – are only *specific intent* crimes. In fact, the section clearly distinguishes between specific and general intent offenses, since it expressly excludes *involuntary* manslaughter, but includes manslaughter and intentional murder.

All of the offenses listed under 18 U.S.C. § 3559(a)(2)(F)(i) require specific intent. Indeed, the subsection includes the following offenses:

> murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as defined in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in

> section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses[.]

18 U.S.C. § 3559(a)(2)(F)(i).

All of the crimes listed in § 3559(a) require *mens rea*, and the inclusion of robbery among them signals plainly that robbery is a specific intent offense. That conclusion is also clear from Congress' explicit decision to *exclude* one form of an included crime (involuntary manslaughter) that does not have any *mens rea* element.

C. The Third Circuit's Construction Would Produce Anomalous Results

If this Court adopts the Third Circuit's approach to the statutory language of § 2113(a), and omits specific intent from the elements of bank robbery, the crime of bank robbery would constitute a strict liability offense, which has historically been a method of imposing liability reserved for public welfare offenses. "[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978), *citing Dennis v. United States*, 341 U.S. 494 (1951).

In *United States v. United States Gypsum Co.*, the Court went on to warn that offenses that do not contain a *mens rea* element are generally disfavored and "at least with regards to crimes having their origin in the common law, an interpretive presumption [exists] that *mens rea* is required" in federal statutes, explaining that "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an attempt requirement." *Id.* at 837-838. This Court reiterated that principle in *Liparota v. United States*, 471 U.S. 419, 433 (1985), in which this Court held that the Government must prove that a defendant knew his particular behavior violated 18 U.S.C. § 2024(b)(1) (the federal statute governing food stamp fraud, the statute in issue in *Liparota*), before he could be convicted.

More recently, in *United States v. Excitement Video*, 513 U.S. 64 (1994), this Court, in interpreting the *mens rea* requirement of a statute when it was not clear from the wording, explained that there are "presumptions that some form of scienter is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.* at 69.

Moreover, it is clear that bank robbery under section 2113(a) does not qualify as a strict liability offense. In *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), Judge (later Justice) Harry Blackmun set forth various factors which may overcome the presumption against strict liability: (1) that the statutory

crime is not derived from the common law; (2) that there is an evident legislative policy that would be undermined by a *mens rea* requirement; (3) that the standard that the statute imposes is reasonable, and a person is properly expected to adhere to it; (4) that the penalty for violation of the statute is small; and (5) "the conviction does not gravely besmirch."

Applying the above factors to the crime of bank robbery, it is clear that four of the five factors weigh overwhelmingly against strict liability for bank robbery. For example, no party to this action denies that the crime of robbery is derived directly from the common law, and were there a legislative policy that would be undermined by an intent requirement for bank robbery, that policy would logically remove *mens rea* from the *larceny* statute as well. In addition, the penalty for bank robbery – a fine as provided for by Title 18 or imprisonment of up to twenty years, or both – is not "small," and it surely "gravely besmirches the defendant." *See United States v. Excitement Video*, 513 U.S. at 70 (describing violations punishable by up to 10 years in prison as well as substantial fines as "harsh").

Indeed, the penalty for bank robbery is more severe than for bank larceny, which the government concedes requires specific intent. Thus, if the statute is read the way the Third Circuit interprets it, the person guilty of bank larceny, the one who acts with the guilty mind, faces less punishment than the person who acts without the guilty mind and is convicted of bank robbery. Assuming *arguendo* that this Court believed intent should not be read into the bank robbery statute, it defies

logic that Congress would seek to expand the class of persons who would be affected by the bank robbery statute – by removing the intent element – while at the same time expanding the punishment for the crime, potentially to a class of persons who society would not deem 'criminal'.[2]

Congress sought to punish the result of the activity, not the act itself. If the conduct which is sought to be prevented by the robbery statute were the actual "taking" of money, then the larceny statute, with its intent requirement, would undermine that objective. It is clearly not the act of taking that Congress sought to punish in § 2113, but rather the result – the deprivation of property. Because it is in fact the result of the taking, rather than the act itself, that is sought to be prevented, it is credible to deduce that the robbery statute is merely an enhanced larceny crime, one which was accomplished through violence or intimidation. Rather than include enhanced punishment for an aggravated form of larceny – larceny with the use of force – Congress criminalized robbery.

---

[2] It is implausible to assert that Congress intended for an irate customer who, being dissatisfied and upset with the service he received, takes his own money off the counter of a bank, to be guilty of bank robbery under §2113(a) if the teller feels intimidated by the customer's conduct.

D. There Is Not Any Support for the "Exact Words" Test Effectively Adopted Below By the Third Circuit

Also well-briefed by the parties is whether, in order for an offense to qualify as a lesser included offense of another, their elements must be couched in the exact same language. In affirming Mr. Carter's conviction, the Third Circuit adhered to its ruling in *Mosley*, in which it effectively determined that the elements of a lesser offense must be phrased in the exact same language as the greater. *United States v. Mosley*, 126 F.3d 200, 204 (3rd Cir. 1997).

However, as this Court pointed out during oral argument in *Mosely*, "given a Federal Criminal Code with 4,000 sections, or 3,800, having been written at different periods, with different drafting styles, with different understandings of law, don't we have to try to figure out whether Congress implicitly wanted to" retain the element of specific intent in bank robbery under §2113(a)? 1998 WL 731586 at *51.

In that context, the Third Circuit has created an unworkable standard for which Congress – or any legislature – was never on notice when it drafted the various provisions of the federal criminal code. Changes in expression and language, particularly in legal definitions, is a natural aspect of the evolution of a written code. Otherwise, with anachronistic terminology, the law would be beyond understanding of the average person, and likely even the average lawyer and jurist.

In fact, the revisions of 1948 were just such an attempt to modernize the federal criminal code. The Third Circuit, in failing to recognize how terms with common meaning will appear in statutes created and/or amended at different times, has posited an impossible rule of statutory construction, and one that unfairly hurts Petitioner in this case. Congress was not aware that it needed to describe bank robbery and bank larceny in precisely the same terms in order to preserve bank robbery's specific intent requirement and their greater/lesser offense relationship, and it should not have been, since that was never the requisite standard.[3] There is not any reason to adopt it now.

E. Bank Larceny Is a Lesser Included Offense of Bank Robbery Regardless of Whether The Amount In Question Exceeds $1,000

---

[3] It has always been well understood and studied by lawyers and students alike that robbery had larceny as an element. Indeed, the section on robbery in *American Jurisprudence, Second Edition* begins by saying that "[t]he actual taking and asportation of some of the victim's personal property is an essential element of robbery. *In other words, there must first be a larceny.*" 67 Am. Jur. 2d Robbery § 13 (1985)(emphasis added); *See also People v. Butler*, 65 Cal. 2d 569, 573, 421 P.2d 703, 706, 55 Cal. Rptr. 511, 514 (1967)(stating that a specific intent to steal is a necessary element of robbery and that intent to steal may be inferred when one takes the property of another, but the existence of a state of mind incompatible with an intent to steal precludes a finding of theft or robbery); *Commonwealth v. Stewart*, 547 A.2d 1189 (Pa. Super. 1988)(specific intent to deprive is required for robbery conviction).

Another issue to which attention was devoted during argument in *Mosley* was the $1,000 threshold that appears in § 2113(b)(for *felony* bank larceny), but not in § 2113(a) for bank robbery. As explained below, the $1,000 factor notwithstanding, bank larceny remains a lesser included offense of bank robbery under the statute.

The $1,000 threshold does not affect the lesser included offense analysis because the monetary value is not necessary for conviction under bank larceny, but only affects the level of the offense – felony or misdemeanor bank larceny. *See United States v. Mosley*, 126 F.3d 200, 204 n. 2. Thus, the *conduct* required for a bank larceny conviction is the same for a felony and misdemeanor bank larceny, and is also subsumed within the required conduct for bank robbery. *See generally United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999); *United States v. Rodriquez-Moreno*, 526 U.S. 275 (1999)(discussing the importance of where conduct occurred for purposes of venue analysis).

Refusing to read a *mens rea* into the bank robbery statute would lead to the incongruous result of making *misdemeanor* bank larceny a lesser included offense of bank robbery, while *felony* bank larceny would not be, even though all of the conduct elements are the same. The $1,000 language merely grades the offense by the value involved, as evidenced by the Revisor's Notes to § 2113 which describes the monetary threshold in 2113(b) as the means of "*measuring the punishment by the amount involved* . . .." (Emphasis added).

Both bank robbery and bank larceny prohibit the deprivation of property, and each offense is established regardless of the amount involved. The focus of the lesser included offense analysis therefore should be on the prohibited conduct, and not monetary thresholds that determine the grade of the offense. Indeed, the other circuits that have examined this statute, §§ 2113 (a) and (b), have held that the only element that differentiates bank robbery from bank larceny is bank robbery's use of force and violence, or intimidation, in the taking. *See United States v. Walker*, 75 F.3d 178 (4th Cir. 1996), *cert. den.*, 516 U.S. 1250 (1996)(element distinguishing bank robbery and bank larceny is use of force and violence, or intimidation to complete crime); *United States v. Brittain*, 41 F.3d 1409 (10th Cir. 1994)(bank larceny is lesser included offense of bank robbery); *United States v. Carter*, 540 F.2d 753 (4th Cir. 1976)(crimes of bank robbery and bank larceny are most strikingly differentiated by element of force and violence, or intimidation which is required for conviction of bank robbery, but not bank larceny).

In addition, in cases in which the property at issue was the same, larceny has been held to be a lesser included offense of robbery. *See People v. M'Gowan*, 1837 WL 2785 (N.Y. Sup. 1837)(an acquittal for robbery bars prosecution for larceny where property involved is the same); *State v. Mikesell*, 30 N.W. 474 (Iowa 1886)(acquittal for larceny is defense to charge of robbery where same property is subject).

Consequently, § 2113(b)'s $1,000 threshold for felony bank larceny does not disturb the conclusion

that when, as here, the property at issue is the same, bank larceny under § 2113(b) is a lesser included offense of bank robbery under § 2113(a).

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the Court of Appeals for the Third Circuit should be reversed.

Dated: 7 February 2000
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
(*Counsel of record*)
JOSHUA L. DRATEL, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707

Counsel for Amici Curiae National Association of Criminal Defense Lawyers and Association of Federal Defenders

Of Counsel

Marshall A. Mintz